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**ARRESTING TAILHOOK: THE PROSECUTION OF SEXUAL
HARASSMENT IN THE MILITARY**

A Thesis
Presented to
**The Judge Advocate General's School
United States Army**

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

by Lieutenant Commander J. Richard Chema
United States Navy

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**ARRESTING TAILHOOK: THE PROSECUTION OF SEXUAL
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ABSTRACT: This thesis examines the nature and extent of sexual harassment in the military and alternative theories to prosecute conduct deemed sexual harassment. The U.S. Navy has adopted a punitive regulation that directly criminalizes sexual harassment, and there is pending a legislative proposal to add a specific article to the Uniform Code of Military Justice (UCMJ) prohibiting sexual harassment. In contrast to this direct criminalization approach, the existing UCMJ contains numerous provisions that can be used to prosecute underlying conduct that is perceived to constitute sexual harassment. This thesis examines the Navy regulatory prohibition and the proposed statute, and compares these with current UCMJ articles as means for prosecuting sexual harassment conduct. It concludes that the direct criminalization of sexual harassment poses serious constitutional and practical problems that need not be faced since the existing provisions of the UCMJ provide a sufficient substantive body of law to prosecute sexual harassment offenses.

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I. INTRODUCTION

Over the past several years, the military has been rocked by allegations not only that pervasive sexual misconduct against women exists in the ranks, but also that the leadership condones or ignores various sexual abuses: "Tailhook;"¹ rapes of female soldiers during Desert Shield and Desert Storm; institutionalized bias against female sexual assault victims so pervasive that Air Force investigators use a "rape allegation checklist" as a way to minimize or discredit female servicemembers' rape complaints; chaining of a female midshipman to a urinal at the Naval Academy. These and other alarming incidents have focused attention on the way women are treated in the military like never before. The revelation of dishonorable conduct engaged in by many Naval officers against women at the 1991 Tailhook Convention in Las Vegas, the apparent desire of Navy leadership to cover-up the situation, and the failure of the Navy to resolve the scandal in a timely manner have created a public perception of widespread "sexual harassment"² in the armed forces, especially in the Navy. Public awareness of these problems in the military has been heightened because they have followed immediately in the wake of the widely publicized Clarence Thomas Supreme Court confirmation hearings.³

Apparently in response to the problems perceived to exist in dealing with women, the Navy recently revised its policy on "sexual harassment." On January 6, 1993, the Acting Secretary of the Navy published a regulation implementing a new sexual

harassment policy for the Naval services. This regulation⁴ defines sexual harassment and makes violation of its prohibition of sexual harassment a punitive offense punishable under the Uniform Code of Military Justice (UCMJ).⁵ This regulation is the first instance of criminalizing conduct as per se sexual harassment, as opposed to prosecuting the underlying conduct under various traditional criminal statutes.

This article examines whether substantive changes in military law (like the Navy Regulation) are necessary to adequately deal with the mistreatment of women in the military. It examines conduct that is commonly referred to as sexual harassment and discusses how it can be prosecuted under current provisions of the UCMJ. Additionally, the Navy Regulation and other similar regulatory and statutory proposals,⁶ which aim directly at criminalizing conduct as sexual harassment, are examined and compared with existing UCMJ provisions as vehicles for prosecuting conduct deemed to be sexual harassment.

Criminal prosecution of sex crimes and sexual harassment is an important aspect of an overall military policy against discrimination and abuse of women in the armed forces. Choosing the correct approach, either the direct criminalization of sexual harassment through efforts like the Navy Regulation, or an aggressive reliance on traditional criminal statutes geared at the underlying criminal conduct of the alleged harasser, will be a major step towards resolving the mistreatment of women in the military.

II. WHAT IS "SEXUAL HARASSMENT?"

A. Employment Discrimination Law

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for any employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁷

This statute has led to the development of a vast body of employment discrimination law. One aspect of employment discrimination is sexual harassment. In 1980, the Equal Employment Opportunity Commission (EEOC) published Guidelines defining sexual harassment. The Guidelines currently state:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an

individual's work performance or creating an intimidating, hostile, or offensive working environment.⁸

The Guideline identifies the nature of the two general types of sexual harassment; quid pro quo harassment and hostile environment harassment. Quid pro quo is the most easily recognizable form of sexual harassment. It involves conditioning a subordinate's economic or other job benefits on the subordinate's willingness to furnish sexual favors to a superior. If the victim fails to acquiesce to the superior's sexual demands, quid pro quo harassers may retaliate with some form of workplace punishment.⁹

The second type of sexual harassment, hostile environment sexual harassment, is more subtle and pernicious. In this type of sexual harassment, the emotional or psychological well-being of the victim is damaged from having to work in an environment that is polluted with discrimination. Hostile environment sexual harassment was seen to fall within Title VII because it was the intent of Congress to eliminate employment discrimination in the broadest possible manner through enactment of the statute.¹⁰ The Supreme Court validated the Title VII cause of action for this theory of sexual harassment in Meritor Savings Bank v. Vinson.¹¹ Relying principally on the EEOC Guideline then in effect,¹² the Court rejected the contention that an economic or tangible loss was required under Title VII. Instead, Title VII "affords

employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."¹³ Henceforth, a man or woman would no longer be forced to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living"¹⁴

Vinson identified three critical issues that have been the basis for most hostile environment sexual harassment litigation. First, not all conduct rises to the level of actionable harassment which affects terms, conditions, or privileges of employment. Instead, there is a Title VII violation only if it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."¹⁵

Next, the conduct of the harasser must be "unwelcome," as distinguished from the criminal concept of involuntariness, which involves forced participation against one's will.¹⁶ Since Vinson, the test for "unwelcomeness" has generally been whether the harassed employee solicited or incited the conduct, and whether the harassed employee regarded the conduct as undesirable or offensive.¹⁷

Finally, Vinson laid out the initial framework for determining when an employer would be liable for the sexual harassment of its employees. It held that agency principles provided some guidance for employer liability, rejecting both strict liability of employers for the sexual harassment of its employees, and absolute immunity if the employer did not have

notice of the harassment. It also rejected a contention that the mere existence of a policy against discrimination, coupled with a failure by the plaintiff to utilize a grievance procedure, insulates an employer from liability. In so doing, the Court recognized that coming forward to complain puts the employee in risk of retaliation.¹⁸

In hostile environment cases, the plaintiff generally must show that the employer knew or should have known of the harassment, and that he failed to take proper remedial action to stop the harassment.¹⁹ The employer generally will be held to a higher standard when the harasser is a supervisor, as opposed to when the harasser is merely a co-worker.²⁰

Although Vinson recognized the hostile environment Title VII cause of action, there has been continual difficulty in determining the exact nature of such sexual harassment. In Harris v. Forklift Systems, Inc.,²¹ an owner of a company made sexist remarks and jokes with sexual overtones to a female employee, who tolerated the conduct without complaint for a long period of time. Eventually, she complained to him, and finally quit her job when he continued the conduct, albeit after a brief cessation. The district court dismissed the Title VII action because the female employee was unable to meet the Vinson "severe and pervasive" requirement. The lower courts have ruled that in the absence of the plaintiff's making a showing of serious psychological injury, she cannot recover for the offensive comments. On March 1, 1993, the Supreme Court granted certiorari

and hopefully will clarify the standard for hostile environment claims. The nature and extent of the ambiguous hostile environment type of sexual harassment for Title VII will be analyzed in this important case.

B. "Sexual Harassment" in the Military

With the passage of the Equal Employment Opportunity Act of 1972,²² federal employees, including those in the Department of Defense (DOD) and the various military departments, came within the scope of Title VII. The law's protection, however, (and its civil remedy) are only available to civilian employees, as uniformed military members are beyond the scope of the statute. Even though 42 U.S.C. § 2000e-16(a) states that employment discrimination is outlawed as to employees of the military departments, caselaw has held that uniformed servicemembers are excluded from the protection of these anti-discrimination laws in the absence of explicit Congressional inclusion.²³

The refusal to extend the remedy for uniformed personnel is based on the premise that disruption to unique military missions would result if servicemembers were permitted to sue for actions involving their military duties. This is the same rationale delineated in Chappel v. Wallace,²⁴ and Feres v. United States,²⁵ prohibiting military members from asserting causes of action for constitutional and common law torts against the military. Thus,

the military might be liable under Title VII if a uniformed member committed an act of sexual harassment against a civilian employee, but a servicemember cannot sue the military based on a similar sexual harassment claim. While administrative policies provide some protection to uniformed sexual harassment victims, these victims ordinarily have no direct remedy for violations. This lack of a direct remedy is likely part of the reason that there is an increased emphasis on criminalization of sexual harassment in the military. Since something must be done, the obvious place to look for a solution, at least in part, is the military justice system.

The military began to implement policies against sexual harassment at about the same time that the EEOC issued its Guidelines in 1980. Since then, DOD, and each of the military departments, have developed policies and issued numerous regulations prohibiting sexual harassment.²⁶ In so doing, these regulations have generally adopted the EEOC and civilian employment definitions of sexual harassment. The current military sexual harassment definition contained in the SECDEF Memo of 20 July 88 (which has been incorporated into each of the service's regulations), is as follows:

Sexual harassment is a form of sex discrimination that involves unwelcomed sexual advances, requests for

sexual favors, and other verbal or physical conduct of a sexual nature when:

- (1) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career, or
- (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or
- (3) such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

Comparing this definition to the EEOC Guidelines, it is obvious that the military definition is simply a reformulation of the employment sex harassment standard in a military context. It is important to note that the military definition of hostile environment sexual harassment deletes the requirement that it be

in the context of a "working" environment, apparently in recognition that military personnel are potentially always on duty in settings that traditionally are far more expansive than the civilian workplace. Thus, the sexual harassment concept in the military is potentially of far greater scope than that of the civilian workforce.

While the military regulations greatly expand the reach of sexual harassment, until recently they have been interpreted as being nonpunitive in nature.²⁷ However, with the enactment of the Navy Regulation and the political pressure arising in the wake of the Navy Tailhook scandal, there is sure to be increased pressure to prosecute aggravated sexual harassment incidents. The Navy Regulation was obviously enacted with that purpose in mind. Additionally, it is likely there will be renewed interest in utilizing Air Force Regulation 30-2 for that purpose, and there will probably be pressure on the Army to enact a similar punitive regulation. Section IV infra, will analyze in detail the legal consequences of the Navy Regulation. It should be noted, however, that the apparent need for greater sanctions against sexual harassment in the military because of the lack of a Title VII remedy and the highly publicized cases of crimes against women has led to efforts to criminalize sexual harassment. In doing so, the vehicle used in developing the criminal prohibition against sexual harassment is the definition developed in employment discrimination law. This civil law concept has been adopted in toto without any overt modification

or adaption for its new criminal setting. Unlike other civil causes of action that are also crimes (e.g. assault), sexual harassment is very much an evolving, controversial, and unsettled area of the law. The ambiguities of employment discrimination sexual harassment have been magnified in the indiscriminate adaptation of the concept into military criminal law.

III. THE NATURE AND EXTENT OF THE SEXUAL HARASSMENT PROBLEM IN THE ARMED FORCES

A. A New Force Composition With Women: The Historical Background

Prior to World War II, women had only a minor role in the military service. During World War II, however, over 350,000 women served in all branches of the armed forces,²⁸ but they served either in the nurse corps or in separate women's units with a command structure distinct from that of the regular forces.²⁹

Female participation in the armed forces steadily decreased after World War II. In 1947 and 1948 Congress passed legislation limiting the enlisted female participation to 2% of force strength, and female officer strength to 10% of the female enlisted number (not including nurses). The statutory limitation was removed in 1967, but even by 1971 the number of women in the military (approximately 42,800) remained less than 2%.³⁰

In response to the Vietnam War draft experience, the military changed to an all volunteer force beginning in 1973. Additionally, starting in the 1976 academic year, the service

academies were opened to women.³¹ Since then there has been a dramatic rise in the number of women in the armed forces. By 1980, 8.43% of the force was female, and over the next decade the force composition of active duty women increased to 11.5% as of 30 September 1992 (205,571 women in a force of 1,794,459).³² 14.7% of the Air Force, 12% of the Army, 10.4% of the Navy, and 4.5% of the Marine Corps active force is female.³³

In addition to spiraling numbers, women have been increasingly assuming positions that traditionally were reserved for males. Although there are still certain legal restrictions limiting the combat positions that women can occupy,³⁴ those restrictions have come under growing attack, and many have already given way to female participation. In November 1992, The Presidential Commission on the Assignment of Women in the Armed Forces issued a highly controversial report to outgoing President Bush. Generally, the Commission recommended that eligibility for specific positions in the military be done on a gender neutral basis. In a narrow 8-7 vote, however, the Commission recommended continuation of the regulatory land and air combat exclusions for women, while at the same time recommending that most Navy combat vessels be opened to service by women.³⁵ The ultimate responsibility for formulating policy on the extent of female participation in the military was left to the administration of President Clinton. For the purpose of this paper, it is assumed that women will continue to have an expanded presence in the armed forces. For example, Acting Secretary of the Navy Sean

O'Keefe, in January 1993, recommended that women be required to register for potential conscription on the exact same basis as men.³⁶ That the Commission was convened, and that ideas like O'Keefe's are being discussed at the highest levels of our Government, make it clear that the sexual composition of the force has changed irreversibly. Such changes have inevitably resulted in problems with sexual harassment that require attention.

B. The "New" Sexual Harassment Problem in the Military

In light of this historical background, it is generally presumed that sexual harassment has resulted as a negative response by men to the rise of women in the workplace and the movement of women into jobs that previously have been dominated by men. In 1981, Congresswoman Patricia Schroeder wrote as follows about the pervasive sexual harassment problem stemming from the unequal treatment of women in the military:

Sexual harassment is an every day part of the lives of many military women Women complain of unsolicited and unwelcomed advances by male soldiers that often go unpunished, and mess hall stories that often force them to eat off base. Such harassment will probably continue until women are fully accepted as equal and able members of the armed forces.³⁷

Ten years later, another researcher of sexual harassment in the Navy makes the exact same conclusion: "[S]exual harassment flourishes in an atmosphere where women are not accepted as full-fledged members of the established group; where the institutional character of the organization encourages a 'warrior mentality'; and where women's value and worth to the organization is perceived to be in doubt."³⁸

C. The Sexual Harassment Research

Much of the support for the conclusion that sexual harassment is a major workplace problem comes from extensive sociological research that began in 1980 when the United States Merit Systems Protection Board (MSPB) conducted a survey of 23,000 civilian employees to determine the extent and nature of sexual harassment in the federal workplace.³⁹ This study asked federal employees whether they had experienced within a two year period any of the following categories of harassing behavior: (1) uninvited pressure for sexual favors, (2) uninvited and deliberate touchings, leaning over, cornering or pinching, (3) uninvited sexually suggestive looks or gestures, (4) uninvited pressure for dates, (5) uninvited sexual teasing, jokes, remarks, or questions, and (6) uninvited letters, phone calls, or materials of a sexual nature.⁴⁰ Forty-two percent of the female respondents and 15% of the male respondents reported experiencing

one or more of the delineated forms of uninvited sexual attention that the survey equated to sexual harassment during the 1978-1980 study period.⁴¹ Despite finding that sexual harassment was so extensive, only 3% of the women who reported being sexually harassed stated that they filed any formal reports about the harassment.⁴²

In 1988, the MSPB performed a follow-up study of 13,000 civilian employees with very similar results (again 42% of women reported "uninvited sexual attention").⁴³ Both MSPB studies tried to quantify the dollar costs of sexual harassment in terms of expenses due to replacing employees who leave federal service because of sexual harassment, sick leave payments stemming from physical, emotional, or psychological trauma, lowered productivity, litigation expenses, etc. The 1981 report tagged the cost to the federal taxpayer at \$189 million for two years of harassment.⁴⁴ By 1988, that cost had risen to \$267 million for the two year study period.⁴⁵ From these studies it was generally concluded that sexual harassment was a pervasive problem in the federal workplace.

In turn, the military began to study sexual harassment in the services. A 1980 study of 90 enlisted women in the Navy revealed that 90% claimed to have been verbally harassed, and 61% physically harassed by their co-workers. Supervisors reportedly verbally harassed 56% and physically harassed 28% of the sample group. As in the MSPB survey, most victims said they did not report the incidents of harassment. The reasons given for not

reporting were that they handled the problem themselves, they were afraid to report the incident, they did not feel the harassment was serious enough to report, they did not know how to report, or they were too embarrassed to report.⁴⁶ A survey of almost 15,000 enlisted Air Force men and women conducted in 1985 found that 27% of females and 7% of males had been sexually harassed over a four week period prior to the questioning.⁴⁷ In the Army, a 1978 questionnaire sent to 91 enlisted women assigned to the Signal Corps in West Germany reported that more than 50% had been sexually harassed by their supervisors.⁴⁸ A random survey of 512 female soldiers done by the Army Audit Agency reported that 66% of the female enlisted soldiers had either been victims or witnessed incidents of sexual harassment.⁴⁹ Reports by the Defense Advisory Committee on Women in the Service highlighted numerous instances of sexual harassment. Eventually, a Secretary of Defense Task Force recommended a DOD survey, which was conducted world-wide in 1988 and 1989.⁵⁰

This survey, building on the methodology and questions asked in the MSPB surveys, was sent to over 35,000 servicemembers, with approximately 20,000 questionnaires returned.⁵¹ The study attempted to take into account the military rank structure, and that servicemembers are theoretically always on duty.⁵² The survey found that 64% of females and 17% of males (officers and enlisted) had experienced at least one of the forms of sexual harassment identified in the MSPB survey at least one time in the one year survey period.⁵³ Verbal abuse was by far the most

common form of harassment, with 52% of female respondents acknowledging experiencing it.⁵⁴ The survey also reported that 5% of female harassment victims reported incidents of actual or attempted rape or assault, and 12% reported pressure exerted for sexual favors.⁵⁵ As in the MSPB study, few victims took formal action against the perpetrators. In the DOD survey, only 10% of the female victims acted formally, with 64% of those who did not formally act stating they did not because they resolved the problem themselves or they thought they could resolve the problem themselves.⁵⁶

Another survey, this time done Navy-wide, was administered in September 1989. Although again modeled after the MSPB survey, this survey asked specifically whether the participants had ever experienced sexual harassment as defined in the SECDEF Memo of 20 July 88.⁵⁷ The survey (with 5,619 completed questionnaires), again found that 42% of female enlisted personnel and 26% of the female officers said they had been sexually harassed within the previous year, either on duty or while located on a base or ship while they were off duty.⁵⁸ Again, the vast majority of the harassment was in the nature of unwanted sexual teasing, jokes, looks, etc. Consistent with the DOD survey, only 6% of the enlisted female respondents and 1% of the officer female respondents reported experiencing the most serious form of sexual harassment - actual or attempted rape or assault.⁵⁹

The survey confirmed that junior enlisted (E-2's & E-3's) were the most likely candidates to experience harassment (49%),

with the percentages decreasing steadily until the rate for more senior officers (O-4's to O-6's) declined to 1%.⁶⁰ Almost all the perpetrators were men.⁶¹ Again the typical victim response was to ignore the behavior. The female enlisted reporting rate was only 24%, and the female officers reported at an even lower 12% rate.⁶²

Research like the surveys noted above continues to be conducted. A follow-up of the DOD survey is to be administered in 1993.⁶³ The data from this survey research clearly indicates that sexual harassment is a problem that must be addressed by military leadership. The highest levels of the military bureaucracy have, in turn, directed that policy initiatives be implemented as a result of the survey data. Former Secretary of Defense Cheney relied on the survey results to conclude that stronger steps needed to be taken to eradicate sexual harassment. He demanded that each DOD component implement a zero tolerance policy for sexual harassment, and that annual reports on the implementation and effectiveness of the policies be submitted.⁶⁴ In turn, the bureaucracy has responded with numerous initiatives to correct the perceived problems.⁶⁵

D. **Publicized Cases of Crimes Against Women in the Military: Tailhook and Other Abuses**

While the survey data regarding sexual harassment in the military has been available for more than ten years, media coverage of certain high-profile instances of "sexual harassment"

have brought increased attention to the issue. The first highly publicized incident was the case of the 19 year old female midshipman at the U.S. Naval Academy in Annapolis who was physically chained to a urinal by two male midshipmen, while other males photographed and taunted her. The incident occurred on December 8, 1989. The two midshipmen who were the primary abusers received only administrative punishments of demerits and liberty restrictions for their misconduct. The victim subsequently resigned from the Academy in May 1990, stating that she was chagrinned at the delays in fully investigating the abuse and outraged at what she considered inadequate punishment for the perpetrators.⁶⁶

Following closely on the heels of the Naval Academy scandal were allegations of rapes, sexual assaults, and violations of anti-fraternization rules at the Orlando, Florida, Naval Training Center. News media accounts reported that there were numerous cases (24) of rape or sexual assault that were reported to Navy officials during 1989-1990, but few of the cases were criminally prosecuted.⁶⁷

Even though the Navy appears at the forefront of the sexual misconduct problem, it has not been alone. For instance, the media reported that a recent Freedom of Information Act request to the Army revealed that from 1987 to 1991, 484 female soldiers were raped while on active duty, including seven who performed duties in the Persian Gulf during Operation Desert Shield/Desert Storm.⁶⁸ Additionally, the Air Force was recently accused of

insensitivity to the problems of women when Congresswoman Schroeder revealed that Air Force criminal investigators were trained to use a questionnaire which was designed to prove that women who reported sex offenses were lying. On September 23, 1992, the Secretary of the Air Force ordered that the use of the questionnaire be discontinued.⁶⁹

By far, however, the most notorious instances of "sexual harassment" in the military stem from the Tailhook Association convention held at the Las Vegas Hilton Hotel in September, 1991. The Tailhook Association is a private organization comprised of active, retired, and reserve Naval and Marine Corps aviators, as well as defense contractors, and others involved in naval aviation. The Association sponsors an annual professional convention which, in the past, received considerable indirect Department of the Navy support. It is also well known in the aviation community that these conventions serve as a venue for parties involving drunkenness and less than gentlemanly conduct.⁷⁰

Over 5,000 people attended the September 1991 convention, including several of the senior leaders of the Navy. The Secretary of the Navy spoke at one of the sessions, and attended some of the social activities. The Chief of Naval Operations was also present, as were more than 30 other active duty flag officers.⁷¹

Allegations of crimes and inappropriate conduct at the 1991 Tailhook Convention first surfaced in October 1991, when a female

naval aviator, LT Paula Coughlin,⁷² wrote a letter to the Assistant Chief of Naval Operations complaining that she had been physically and sexually assaulted by a group of drunken aviators who formed a "gauntlet" in a hotel corridor.⁷³ In subsequent investigations, it was learned that various women who had the misfortune of entering this hallway were attacked by groups of men who pushed them through the gauntlet grabbing at their buttocks, breasts, and crotches.⁷⁴

In addition to the "gauntlet," many aviation squadrons sponsored "hospitality" suites at the hotel during the convention. A great deal of drunken and lewd behavior apparently occurred in these hospitality suites, including indecent exposures by both men and women, viewing of pornographic movies, public shaving of women's legs and pubic areas, and drinking alcohol from dispensers that resembled phallic devices.⁷⁵

While the Navy and the Secretary of the Navy (who reportedly visited some of the hospitality suites one of which had a rhinoceros phallic device dispensing white Russian drinks to women only after they either simulated masturbating it or performing fellatio on it)⁷⁶ had official "zero tolerance" policies on sexual harassment, their knowledge about the past activities at various Tailhook conventions, and their presence at Tailhook 91, raised serious questions about whether top Navy leadership actually sanctioned and condoned this type of sexual harassment. For example, the female aviator who was assaulted by

the gauntlet reported the treatments to her admiral and he essentially took no action.⁷⁷

Thus, Tailhook 91 can be viewed as the culminating point in the Navy of sexual misconduct, including assaults, a hostile environment for females, and a lack of supervisory response to sexual harassment. And despite expending enormous resources in investigating the events at Tailhook 91 (and investigating the investigators), as of Spring 1993, no disciplinary action has been taken against any of the perpetrators of the offenses at the 1991 convention or of any Navy/Marine Corps officials who allowed the activities to occur.⁷⁸

Other media reports of mistreatment of women in the armed forces are also easy to find. These publicized incidents are pertinent to this paper for two reasons. First, the cascading incidents, especially in the Navy, have led to a public perception that sexual harassment is rampant in the military and that something needs to be done. Second, examination of these highly publicized cases, such as Tailhook, Orlando, and the Naval Academy incident, reveals that the problem is not so much traditional work-place sexual harassment, but is instead a failure of leadership to identify that serious sex crimes are being committed in the military environment and a refusal to prosecute the cases in a timely and effective manner. Despite the fact that the conduct has generally been assaultive in nature or involved abuses of position by superiors, discussion of the issues lumps the behavior into the catch-all category of "sexual

harassment." By this amalgamation of criminal conduct into a generalized concept of sexual harassment, the true essence of the conduct is distorted.

IV. THE NAVY REGULATORY CRIMINALIZATION OF SEXUAL HARASSMENT

A. The Regulatory Scheme: Making Ambiguous Hostile Environment Conduct Criminal

On January 6, 1993, the Navy published a new regulation prohibiting sexual harassment. This regulation is unique in that it specifically criminalizes conduct as sexual harassment per se, as opposed to prosecuting underlying conduct that may be interpreted as sexual harassment, but in any case, violates other established criminal statutes. This section of this article will describe the most pertinent aspects of the Navy Regulation and attempt to identify some underlying problems with the approach the Navy has chosen to pursue in criminalizing sexual harassment.

The Regulation applies to all Department of the Navy (DON) personnel, civilian as well as military. It establishes an education, training, and recording system to track incidents of sexual harassment. It also provides mandatory administrative processing requirements in certain instances for uniformed

members. The crux of the Regulation, however, is in the paragraph entitled "Accountability:"

No individual in the DON shall:

- (1) Commit sexual harassment, as defined in enclosure (1);⁷⁹
- (2). Take reprisal action against a person who provides information on an incident of alleged sexual harassment;
- (3) Knowingly make a false accusation of sexual harassment; or
- (4) While in a supervisory or command position, condone or ignore sexual harassment of which he or she has knowledge or has reason to have knowledge.⁸⁰

Paragraph 8c of the Regulation states that the above provisions are punitive in nature for military personnel and that "[t]he prohibitions in subparagraph 8b apply to all conduct which occurs in or impacts a DOD working environment as defined in enclosure (2). The reasonable person standard as defined in enclosure (2) shall be used to determine whether a violation of these provisions has occurred." As defined by the enclosure, "working environment" is:

[T]he workplace or any other place that is work-connected, as well as the conditions or atmosphere under which people are required to work. Examples of

work environment include, but are not limited to, an office, an entire office building, a DOD base or installation, DOD ships, aircraft or vehicles, anywhere when engaged in official DON business, as well as command-sponsored social, recreational and sporting events, regardless of location.⁸¹

The "reasonable person standard" is defined as follows:

An objective test used to determine if behavior constitutes sexual harassment. This standard considers what a reasonable person's reaction would have been under similar circumstances and in a similar environment. The reasonable person standard considers the recipient's perspective and not stereotyped notions of acceptable behavior. For example, a work environment in which sexual slurs, the display of sexually suggestive calendars, or other offensive sexual behavior abound can constitute sexual harassment even if other people might deem it harmless or insignificant.⁸²

Accordingly, the scope of the prohibition is enormous. All quid pro quo, and hostile environment conduct is now formally criminalized for naval personnel. The hostile environment conduct must relate to the military work environment, but that

term covers conduct that can in almost any way relate to the involvement of the military. Furthermore, commanders and supervisors who fail to ferret out sexual harassment in areas under their cognizance are also liable. Finally, taking reprisals against a complainant or anyone who supplies information about sexual harassment violates the Regulation, as does reporting a false sexual harassment allegation.⁸³

The prohibitions against quid pro pro sexual harassment are noncontroversial, even though they duplicate prohibitions already in effect.⁸⁴ The initial difficulty posed by the Regulation is in its criminalization of hostile environment sexual harassment. The Regulation attempts to define this new crime in three separate places, but in reality it only serves to confuse what is criminally forbidden. The result is that the standard of criminality is hopelessly vague and probably constitutionally defective.

To determine what constitutes the offense of hostile environment sexual harassment, numerous interrelated definitions must be examined. First, the general definition of sexual harassment (enclosure (1)) forms the basis for the prohibition. The opening words of this definition states that "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" constitute a violation when "such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment." The hostile environment is further described in the last sentence as

"deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature" The focus of the hostile environment is thus the "unwelcome" nature of the sexual conduct.⁸⁵

"Unwelcome" is defined as "[c]onduct that is not solicited and which is considered objectionable by the person to whom it is directed and which is found to be undesirable or offensive using a reasonable person standard."⁸⁶ The main characteristic of unwelcome conduct is that the person perceiving the conduct finds it objectionable. The definition attempts to allay the completely subjective aspect of this determination by also requiring that the conduct be undesirable or offensive using the "reasonable person" standard. The "reasonable person" definition initially states it is an objective standard, but it has a caveat. It emphasizes that the reasonable person has the recipient's "perspective," "not stereotyped notions of acceptable behavior."⁸⁷ The meaning of this phrase is inscrutable, and the example that the definition provides does nothing to clarify the issue. In the example, sexual harassment can exist under the reasonable person standard when there is "offensive sexual behavior" "even if other people might deem it to be harmless or insignificant."⁸⁸ The implication here is that a hostile environment may exist even if the people working in the environment are so insensitive that they are not offended by conduct that should offend them. Such a rule, however, seems to run counter to the requirement that the conduct be "unwelcome" by

the recipient. The standard is, therefore, internally inconsistent.

"Unwelcomeness" is a subjective reaction of how certain third parties feel about the unsolicited acts or words of an actor. It is a concept developed by and borrowed from Title VII employment discrimination law. While it is true that all surrounding facts and circumstances must be evaluated to determine if the recipient in fact welcomed the conduct,⁸⁹ this does not turn the "unwelcomeness" test into an objective inquiry. The analysis still focusses on the feelings of the recipient. The criminality of an actor's conduct turns on the subjective, and perhaps never manifested, feelings of third parties. The reasonable person standard, however, is normally a completely objective test, which seeks to determine if in light of societal norms certain conduct falls below acceptable levels. By cross-referencing these two distinct concepts, it is difficult or impossible to determine what the legal standard is that will impose criminal liability for hostile environment sexual harassment.⁹⁰

Although not explicitly stated in the Regulation, the merging of the unwelcomeness and reasonable person concepts may be an attempt to develop a "reasonable woman standard." Several Title VII cases have adopted such a standard because courts perceive that the gender-neutral reasonable person standard is a male-biased standard that systematically ignores the perceptions and reality of women.⁹¹ Any such movement to place a gender

qualification on the reasonableness standard in criminal law is sure to increase difficulties in defining criminality.

What is referred to as hostile environment sexual harassment actually has two components. The unwelcome conduct can "interfere" with an individual's performance or create a hostile work environment. In the first instance, the perpetrator can be guilty even though he has no intent to offend and has received no manifestation from the "victim" that he has offended. For this offense, none of the definitions give any reference to the "reasonable person standard." Thus, a person could be guilty, for example, merely by asking another (who deems the conduct unwelcome) out on dates, which attention causes the recipient to not be able to do her job as well as formerly (as evaluated by some nondelineated person). For this offense, there is in essence no standard of criminality.

The enclosure (1) sexual harassment definition has one other ambiguity that should be mentioned at this point. The last sentence states that "deliberate or repeated unwelcome" conduct is a violation. The word "deliberate" is a special mental element akin to specific intent. The remainder of the sexual harassment definition has no intent element. However, it must be deliberate "unwelcome" conduct, and "unwelcomeness" is determined by the subjective feelings of the recipient; feelings that the perpetrator may never be capable of knowing. Thus, the Regulation simply creates confusion about the nature, if any, of a scienter requirement.

In sum, the primary sexual harassment definition, and the Regulation's amplifying definitions, seem to blur the legal standard for hostile environment sexual harassment. Perhaps in recognition of the ambiguity of the concept, the drafters of the Regulation have provided, as enclosure (3), a document that they term "Range of Behaviors Which Constitute Sexual Harassment." Although not part of the punitive aspect of the Regulation, it is apparently furnished to clarify what conduct is criminal and what conduct is not. In reality, the enclosure merely demonstrates the failure of the Regulation to define a standard with enough certainty to meet constitutional standards.⁹²

Paragraph 5 of enclosure (3) is the pertinent aspect of the document. In this paragraph the drafters attempt to explain what conduct is criminal by analogizing sexual harassment to a traffic light. Certain conduct is "green," i.e., conduct that is clearly not sexual harassment. Examples of "green" conduct include social interaction, counselling on military appearance, and polite compliments. At the other extreme is "red" conduct (that which is clearly sexual harassment and criminal) such as quid pro quo actions, sexually explicit pictures, including calendars or posters,⁹³ or sexually assaultive conduct.⁹⁴

"Yellow Zone" conduct is behavior that "may be sexual harassment." It is described as follows:

Yellow zone . Many people would find these behaviors unacceptable, and they could be sexual harassment:
violating personal "space", whistling, questions about

personal life, lewd or sexually suggestive comments, suggestive posters or calendars, off-color jokes, leering, staring, repeated requests for dates, foul language, unwanted letters or poems, sexually suggestive touching, or sitting or gesturing sexually.

The enclosure concludes with the following pertinent admonition: "Any time sexual behavior is introduced into the work environment or among co-workers, the individuals involved are on notice that the behavior may constitute sexual harassment."⁹⁵

In a society where sexuality is pervasive, enclosure (3) only serves to compound the obvious difficulties in defining a standard that would criminalize "stares", "leers," and other "sexual behavior." The publication of the Regulation, with the explicit warning about sexual behavior, may provide adequate notice that sexual harassment is prohibited in the military, but it does not give adequate notice about what conduct is sexual harassment. In reality, the Regulation poses serious vagueness problems.

B. Unconstitutional Vagueness

A law is unconstitutionally vague and offensive to due process if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute . . ."⁹⁶ Citizens are entitled to have a clear

enunciation of what the law commands and what it forbids.⁹⁷ The policies prohibiting unduly vague criminal statutes have been set forth succinctly by the Supreme Court in Grayned v City of Rockford:⁹⁸

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the lawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

As implicated by this quote, when a law inhibits the exercise of a constitutionally protected right, the constitutional demand for clarity is even more compelling.⁹⁹

The inability of the Navy Regulation to develop a clear standard of what constitutes hostile environment sexual harassment appears to make the Regulation a prime candidate for a vagueness challenge. Commission of the offense is dependent upon the subjective reactions of potentially numerous victims, some of whom the actor will not even be aware exist. Furthermore, in enclosure (3), the acknowledgement of the ambiguity of "yellow zone" conduct only reiterates the vagueness of the Regulation. It is also clear that the Regulation specifically affects speech, so the heightened degree of clarity is necessary.

The vagueness doctrine "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision" because there are inherent ambiguities in the English language.¹⁰⁰ This exception to the doctrine does not save the Navy Regulation, however, for two reasons. First, the ambiguity is not in the language of the Regulation, but is instead in the inability of the actor to know beforehand whether his conduct will create the hostile environment. Second, the exception apparently does not operate when there is a freedom of speech issue at stake.¹⁰¹ The Regulation certainly affects speech.¹⁰²

The vagueness doctrine is applicable to military criminal law.¹⁰³ The constitutional standard for determining the clarity of a statute also applies to criminal sanctions contained in regulations.¹⁰⁴ While vagueness concerns have at times arisen in the context of UCMJ, Article 92 orders,¹⁰⁵ the principal focus in the military has been vagueness claims arising under UCMJ, Articles 133 and 134. The seminal case is, of course, Parker v. Levy,¹⁰⁶ where the Supreme Court upheld the two general articles (Articles 133 and 134) against vagueness and First Amendment overbreadth challenges.

In upholding the two general articles, then Justice Rehnquist stressed several points. First, "the military is, by necessity, a specialized society separate from civilian society"¹⁰⁷ with a legal code that regulates a far broader range of conduct than civilians are subject to under state criminal codes.¹⁰⁸ Second, because Congress has great authority in regulating military affairs, Captain Levy was not permitted to challenge the two articles as vague as to conduct of others that might marginally fall outside the statute's parameters because he was clearly on notice that his conduct was unacceptable. In so ruling the Court wrote: "Because of the factors differentiating military society, we hold that the proper standard for review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs."¹⁰⁹

While Parker v. Levy usually gives the military great leeway, it arguably does not provide the Navy much comfort for its Regulation. First, the extraordinary deference shown to the distinct military community is permitted because Congress is given a wider range to legislate. A regulation promulgated by military authorities may not be given such deference. Second, while increased discipline is always something distinctive to the military, the concept of sexual harassment is actually a civilian anti-discrimination scheme that Congress has not seen fit to apply to uniformed personnel.¹¹⁰ In light of the fact that Congress has enacted numerous far-ranging Code provisions that cover most conduct that can be deemed sexual harassment, the special deference due to the military to fill the vagueness gaps does not seem particularly appropriate.

In Parker the Supreme Court looked at interpretations of the law by military courts and commentators, the Manual for Courts-Martial, training received in military law by servicemembers, and probably of most importance, military customs and usages, as a means of narrowing the scope of Articles 133 and 134.¹¹¹ In United States v. Johanns,¹¹² a fraternization prosecution against an Air Force captain, the Court of Military Appeals (COMA) ruled that the lack of military customs, usage, and training precluded the prosecution under Article 133 on vagueness grounds, even in light of the relaxed standard of Parker. The same contentions seem applicable to the Navy Regulation, even though recently there have been significant

training efforts by the military on the prevention of sexual harassment.

Much of the debate over constitutional vagueness centers on whether a statute is vague on its face, and thus should be struck in toto, or vague as applied, so that it is challengeable only when the conduct of the defendant falls directly within the ambiguous aspect of the statute.¹¹³ This distinction should not long detain us because the concern over sexual harassment is precisely the ambiguous type conduct, or in the words of the Regulation, the "yellow zone" conduct. This is behavior which by definition is ambiguous. The prohibitions are subject to constitutional vagueness challenges because the conduct cannot be said to fall plainly within the terms of the Regulation.¹¹⁴ The danger in enacting such a law is that if the military moves too far in prosecuting "yellow zone" conduct, servicemembers will have little or no notice of what they can or cannot do. "Yellow zone" conduct thus becomes whimsically subject to enforcement by law enforcement agents, convening authorities, and prosecutors, the precise danger that the vagueness doctrine guards against.

An example of where the military edged close to the border of the vagueness doctrine was United States v. Guerrero.¹¹⁵ In Guerrero a sailor was convicted under Article 134 for cross-dressing. COMA unanimously agreed that the accused was on sufficient notice that "picking-up" a junior sailor, and bringing him to the accused's home where he then propositioned him in drag, was conduct prejudicial to good order and discipline.

However, Senior Judge Everett dissented on vagueness and notice grounds as to a specification where the accused in his own home was casually observed cross-dressing.¹¹⁶ Such conduct is quite analogous to "yellow zone" conduct. While there are undoubtedly many prosecutions for "red zone" sexual harassment that could be constitutionally maintained under the Regulation, those could also be conducted under the standard tried and true Code provisions.¹¹⁷ The danger arises in "yellow zone" conduct.

C. Borrowing Title VII Law

In analyzing the hostile environment type of sexual harassment thus far, resort has been taken simply to the regulatory definitions. The underlying military sexual harassment definition, however, is merely an adaptation of the concept from Title VII law. Does the Navy regulatory offense incorporate all, part, or none of Title VII law? The Regulation does not answer this question.¹¹⁸ Furthermore, Title VII law itself is highly unsettled as to the standard for civil liability for hostile environment conduct. It, therefore, is not a good model on which to base a new criminal offense.

Two examples deriving from Title VII law will touch on the problem of creating a criminal standard from the borrowed employment discrimination standard. First, in Vinson the Supreme Court added to the EEOC Guidelines standard a requirement that the conduct of the harasser had to be sufficiently severe or

pervasive that it altered the conditions of employment and created a hostile environment.¹¹⁹ This "severe or pervasive" requirement does not appear to be a part of the Regulation's hostile environment prohibition.¹²⁰ If the Regulation does not have this requirement, then the criminal standard will be significantly less demanding than the civil standard.

Second, the federal circuits are split as to what the standard is for finding severe and pervasive conduct. In three circuits the courts have held that to satisfy this element a plaintiff must merely show that she was offended, and that the conduct would have offended a reasonable victim.¹²¹ In three other circuits, however, the plaintiff must additionally show that she suffered serious psychological injury from the harasser's conduct.¹²²

Whether this serious psychological injury is a necessary prerequisite is the issue the Supreme Court will decide next term in Harris v. Forklift Systems.¹²³ Presumably, the drafters of the Regulation did not intend to have this type of requirement. However, it is totally unclear if Title VII interpretations are part of the military crime. By tying the regulatory crime into civil concepts which are in flux and uncertain, the criminal ambiguity problem is magnified. Additionally, it will be difficult to determine how concepts that may only be applicable to civilian employment law are rejected or translated into military criminal law.¹²⁴

D. The Regulation and the First Amendment

"Women aren't strong and smart enough to be Navy lawyers. They belong in the kitchen and bedroom, not the courtroom." Although the above statement is stupid, under the First Amendment it is probably protected speech. Using the definitions contained in the Regulation, however, this type of statement would constitute hostile environment sexual harassment.¹²⁵ That the Regulation could sweep with such great breadth in a constitutionally protected area poses serious dangers to the First Amendment rights of servicemembers.

An exhaustive survey of First Amendment law, and its relationship to sexual harassment, is beyond the scope of this paper. Two law review articles have recently been published, however, reaching differing conclusions as far as the constitutionality of Title VII hostile environment sexual harassment restrictions on freedom of speech.¹²⁶ Professor Marcy Strauss of Loyola Law School argues that First Amendment doctrine should be modified to permit a balancing approach such that the value of free speech to the harasser in the workplace would be weighed against the rights of society and women to have equality in the workplace. Under this approach, Professor Strauss finds justification for almost all regulation of speech in the workplace.¹²⁷

Professor Kingsley R. Browne of Wayne State University Law School responded to her arguments and concluded that there is no room in First Amendment analysis for restricting hostile environment speech. He argues that speech restrictions that are in categories that have not traditionally permitted regulation inevitably infringe upon protected speech. Furthermore, the sexual harassment speech restraints are difficult or impossible to frame so that only "valueless sexist" speech is prohibited. Finally, he contends that such restraints may be counterproductive to their goal of decreasing discrimination against women because hearing the baldest forms of offensive speech reveals its lack of merit in the political marketplace of ideas. The voicing of even unpopular and reprehensible ideas must be allowed in a democracy.¹²⁸ Significantly, both scholars agree that restriction of speech rights through Title VII is an issue of major constitutional importance, and that current First Amendment doctrine prohibits the speech limitations that are contained in hostile environment sexual harassment employment law.¹²⁹ Even though the reach of the First Amendment may at times be more narrow for servicemembers, its basic protections are still in force in the military.¹³⁰ Accordingly, the Regulation poses serious First Amendment concerns.

Under traditional First Amendment analysis, Congress can only limit speech if the speech is either not entitled to First Amendment protection or there is a compelling government interest of the highest order. Regulation of speech that is obscene,¹³¹

defamatory,¹³² constitutes fighting words or incitement to crime,¹³³ advocates overthrowing the Government by unlawful means,¹³⁴ or hinders a war effort¹³⁵ have all been upheld to varying degrees. Furthermore, regulations that aim not at the content of the speech, but instead merely enforce reasonable time, place, or manner restrictions on expression have been held constitutional.¹³⁶

While First Amendment doctrine is incredibly complex, the basic tenet of the doctrine as enunciated in the military caselaw derives from the "clear and present danger doctrine." In United States v. Priest,¹³⁷ a sailor was court-martialed for publishing diatribes against American military involvement in Vietnam. COMA expressly stated that "the proper standard for the governance of free speech in military law is still found, we believe, in Mr. Justice Holmes's historic assertion in Schenck v. United States."¹³⁸ Because of the unique nature of the military and its necessity for discipline, more speech presents "clear and present dangers" and can, therefore, be regulated:

In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action

and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.¹³⁹

In Parker v. Levy, the Supreme Court affirmed the Priest First Amendment analysis for the military, and quoted with approval the above passage.¹⁴⁰ Parker also implied that the "overbreadth doctrine" (although inapplicable to Captain Levy because, as an officer, Articles 133 and 134 clearly prohibited his misconduct) might still be available for use in striking a military regulation when the overbreadth is substantial.¹⁴¹ The "overbreadth doctrine" is essentially an exception to the standing principle that allows a litigant to only challenge a statute or regulation that injures him. In the First Amendment arena, the overbreadth doctrine permits a party, under certain circumstances, to challenge the facial constitutionality of a speech limitation as overly broad because it is a violation of someone else's constitutional right. This is permitted even though the regulation applied to the challenging party is not constitutionally deficient.¹⁴² Criminal prohibitions affecting

First Amendment rights are particularly susceptible to overbreadth analysis since the chilling effects of overly broad regulations will cause the citizenry to steer far short of the edges of criminal conduct and, therefore, unnecessarily refrain from exercising their free speech rights.¹⁴³

Since Priest, a review of military caselaw finds a surprising lack of helpful decisions in the First Amendment area. While there are several decisions that reject First Amendment challenges to obscenity regulations,¹⁴⁴ the remainder of the cases where First Amendment issues have been raised are generally disposed of with a citation to Parker and a comment about the unique aspects of military life and discipline.¹⁴⁵

Assuming arguendo the nonapplicability of the overbreadth doctrine, the Regulation can safely withstand First Amendment challenges for hostile environment sexual harassment speech restrictions that are in the nature of quid pro quo, defamation, obscenity, and fighting words.¹⁴⁶ But regulation is unnecessary in these areas because of the constitutionally approved restrictions already contained in other UCMJ provisions. Unfortunately, the Regulation sweeps far more speech within its criminal prohibition than just the established categories. All speech which creates the so-called hostile environment is prohibited. This is a potentially vast restriction on free speech, and should not be allowed.

In Professor Browne's opinion, two features of the speech restrictions in Title VII hostile environment law are

unconstitutional because of the chilling effect they have on free expression.¹⁴⁷ First, the definition of verbal sexual harassment is simply too vague to give sufficient notice as to what words or expressive conduct is prohibited.¹⁴⁸ As already discussed in detail, the Regulation suffers this same infirmity.

The second problem area perceived by Professor Browne with the civil restrictions is that because Title VII at times places vicarious liability upon employers for the harassment of employees, even more protected speech is chilled. This results in employer censorship to avoid their own potential liability. In light of this, employers have generally reacted very forcefully in attempting to prohibit sexual harassment, but still they are being routinely sued.¹⁴⁹ The same censorship and overreaching problems will follow from the criminal respondeat superior provisions of the Regulation.¹⁵⁰

The First Amendment concerns valid in the civil arena, are even more compelling since the Regulation imposes criminal sanctions. Adding to the questions about the constitutionality of speech restrictions in the hostile environment sexual harassment area, is the decision of the Supreme Court in R.A.V. v City of St. Paul.¹⁵¹ There the Court held that a municipal ordinance prohibiting certain "hate" conduct (including expressive conduct) which offended others on the basis of race, color, creed, religion, or gender was facially unconstitutional under the First Amendment. Departing, at least in their methodology, from traditional methods of analyzing a First

Amendment issue, Justice Scalia (for a five member majority) determined that even though the ordinance proscribed "fighting words," which traditionally can be regulated, it did so in a way that amounted to unconstitutional "content discrimination."¹⁵² The ordinance ran afoul of the First Amendment because it prohibited words on only specifically disfavored topics - i.e. race, gender, etc. Holding that the ordinance was a suppression of views opposed by the majority of the populace because of their content, the Court concluded "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."¹⁵³

Strongly reacting to what they perceived to be a new type of First Amendment analysis, the remainder of the Court concurred that the ordinance was unconstitutional because it was overbroad. In the principal concurring opinion, Justice White stated that under the majority's new "underinclusiveness" theory, "Title VII hostile environment work claims would suddenly be unconstitutional."¹⁵⁴ Hostile environment sexual harassment would be a violation (not under the traditional First Amendment analysis discussed above), but because the special prohibition on the "disfavored topic" of sexual harassment is a content based subcategory of discrimination that cannot be prohibited in the absence of prohibiting all harassment nondiscriminatorily.¹⁵⁵ While Justice Scalia attempted to explain that Title VII hostile environment sexual harassment need not fall under the rationale of the opinion,¹⁵⁶ Justice White refuted that explanation.¹⁵⁷

Since the Supreme Court itself is unclear what effect on First Amendment concepts the St. Paul decision will have, especially in sexual harassment litigation, it certainly is obvious that caution in dealing in this area is justified. As discussed above, the military courts have little experience and precedent dealing with First Amendment issues where there have been nonconventional restrictions on speech. Currently pending review at COMA is a case that may portend how the military will respond to more complex First Amendment challenges. In United States v. Hartwig,¹⁵⁸ an officer was convicted of conduct unbecoming when he improperly responded to an "any soldier letter" he received during Operation Desert Storm with a letter containing sexual innuendo. It turned out that his letter was sent to a 14 year old junior high school student. The accused attacked his conviction claiming that Article 133, as applied, was unconstitutionally overbroad and vague. He claimed that the writing of his return letter was protected speech since it was private and not obscene. Relying principally on Parker's analysis that officers are held to a higher standard of conduct, the Army Court of Military Review determined that the language of the letter was offensive, vulgar, and intended to incite lust, and thus his "conduct falls well within the holding of Parker v. Levy which limits an officer's First Amendment rights."¹⁵⁹

Arguably, even under the rationale of the Army Court, the restriction on Hartwig's speech would have been unconstitutional if he had been an enlisted person. It is suggested that COMA

will be forced to address the First Amendment issues in Hartwig in a more comprehensive fashion than was done by the Army Court, and expand on in its own recent treatment of First Amendment issues. This decision will perhaps serve as a guidepost for the First Amendment challenges which are sure to follow from prosecutions under the Regulation.

When looking at much of the speech that arguably falls within the parameters of hostile environment sexual harassment, the "clear and present danger" test (even with the lowered standard due to the unique requirements of military discipline) does not seem to be met. It is difficult to believe discussions of women's roles in the military, jokes, and other pure speech (which may or may not be sexual harassment because it is yellow zone conduct) palpably causes a clear and present danger to military discipline. The prohibition of this speech does not appear desirable or necessary in light of the traditional and constitutionally permissible vehicles for limiting speech.

E. Vicarious Liability for Sexual Harassment

In addition to outlawing quid pro quo and hostile environment sexual harassment, the Regulation contains potentially radical and pervasive provisions for establishing criminal liability on a respondeat superior theory. The Regulation allows a supervisor or person in command to be held criminally liable if they "condone implicit or explicit sexual

behavior to control, influence, or affect the career, pay, or job" of another.¹⁶⁰ Furthermore, paragraph 8b(4) of the Regulation prohibits someone in a command or supervisory position from condoning or ignoring sexual harassment of which he or she has knowledge or has reason to have knowledge.

Three broad questions are raised by these provisions. Who is covered by the provisions, when are they responsible to act against sexual harassment, and what must they do? The Regulation itself, as well as traditional concepts embedded in military criminal law, do not provide much guidance. As to the first question about scope of coverage, just about everyone is covered to varying degrees. Those in command of a unit are easily identified. Those who "supervise," which generally involves most officers, noncommissioned officers, and petty officers, are also apparently covered, at least as far as those areas of duty directly under their supervision. Thus, the scope of the provision is enormous.

The second question concerning the superior's knowledge of on-going sexual harassment is more difficult. Initially, the supervisor must know or have reason to know that sexual harassment (presumably in their area of cognizance) has or is occurring.¹⁶¹ Since, as previously discussed, it is very difficult to ascertain what conduct actually is hostile environment sexual harassment, it will be very difficult to establish actual knowledge. The standard of "has reason to have knowledge" is even murkier.¹⁶²

The closest analogy in military law to this respondeat superior theory is dereliction of duty under UCMJ, Article 92(3). This offense requires that the accused have actual knowledge or reason to know of his duties.¹⁶³ Actual knowledge of one's duties can be proven by circumstantial evidence, and constructive knowledge can be established by resort to regulations, training manuals, customs of the service, or the testimony of those who held the same or similar positions.¹⁶⁴ At first glance, this same standard for knowledge may appear plausible for the Regulation, but there is a qualitative difference between knowledge of an objective set of responsibilities (the servicemember's duties) and knowledge about whether conduct of subordinates constitutes sexual harassment. In reality, the knowledge standard places the supervisor in a position where he must constantly be analyzing whether conduct of subordinates may have been unwelcome to other subordinates. If the supervisor decides that the conduct is not sexual harassment and his decision is wrong, he has then violated the Regulation. Such an equivocal burden will likely foster a tendency by supervisors to deem all "yellow zone" conduct sexual harassment just to avoid the possibility that they will be guilty of violating paragraph 8b(4) of the Regulation. This, of course, is the same overreaching problem that was discussed in the First Amendment context.¹⁶⁵

Not mentioned in the Regulation, but also a problem, is how to determine the predicate sexual harassment for prosecution of the respondeat superior offense. Presumably this will require an

initial trial within a trial to determine whether the perpetrator committed sexual harassment. Independent judicial or administrative determinations of the underlying sexual harassment cannot be used because reliance on these determinations would violate the due process rights of the accused since elements of the respondeat superior crime would be established without confrontation, cross-examination, etc. This will obviously complicate the prosecution of such an offense. Similarly, the Regulation neglects to address the effect of independent judicial or administrative determinations that either exonerate or obfuscate the conduct that forms the basis for the respondeat superior offense. The only workable resolution of this issue is that these independent proceedings are of no relevance in the respondeat superior prosecution. This could lead to the rather anomalous situation where the underlying conduct is deemed in one proceeding not to be sexual harassment and the perpetrator excused, but the supervisor punished because the underlying conduct is deemed sexual harassment in the respondeat superior trial.

The final element of the respondeat superior offense is that the supervisor either "condones" or "ignores" the subordinate's conduct. By placing the admonition in the negative, the Regulation does not explicitly say what the supervisor is obligated to do. Is he obligated to investigate, counsel, or prosecute the underlying harasser? If he investigates and determines that harassment has occurred, but does nothing else,

arguably he would not be guilty under the Regulation. In such a scenario he has not "ignored" the harassment, but perhaps he has "condoned" the harassment. What does a low level supervisor do to avoid "condoning" or "ignoring?" These vital questions are simply unanswered by the Regulation.

Condone and ignore are not concepts generally prosecuted in the criminal law.¹⁶⁶ Such prosecutions would obviously have First Amendment problems, and reek of police-state tactics. In the absence of some affirmative imposition of duties on supervisors, the condone and ignore provisions of the Regulation are inherently ambiguous. The imposition of a new category of criminal liability for supervisors for the sexual harassment of subordinates poses enormous problems,¹⁶⁷ and if undertaken, it should be done using the traditional means available to the military, the dereliction of duty offense under Article 92.

F. Reprisals and Miscellaneous Provisions of the Regulation

Paragraph 8b(2) of the Regulation creates the new offense of taking "reprisals" against a person who reports an alleged incident of sexual harassment. A reprisal is "the wrongful threatening or taking of either unfavorable action against another or withholding favorable action from another solely in response to a report of sexual harassment or violations of this instruction."¹⁶⁸ This aspect of the Regulation seems to be a

laudatory provision that fills a gap in the Code for wrongful conduct that is directed against whistleblowers and victims of sexual harassment.¹⁶⁹ While such a provision is beneficial, as currently drafted it contains no scienter requirement. The only aspect of criminality stems from the reprisal definition which includes the word "wrongful."¹⁷⁰

Due to the nature of sexual harassment allegations, there likely will be many cases where a subordinate's continued presence under the supervision of a person against whom she has filed a complaint affects the mission and is disruptive of good order and discipline in the working environment. Absent a clearer standard for criminality, the mere transfer of the subordinate, pending resolution of the underlying sexual harassment claim, would probably generate a valid reprisal charge even where the underlying allegation of sexual harassment is totally without merit. While such a transfer may not be "wrongful" within the terminology of the Regulation, a more specific standard for criminality appears justified, at least for clarity purposes.

Inclusion in the reprisal crime of a scienter requirement would be beneficial. It could narrow the reprisal activity to those actions taken with an intent to punish, demean, or embarrass the party providing information concerning a sexual harassment allegation, or done with an intent to impede the fair and accurate gathering of information on the allegation. Such an

addition would ensure that innocent, managerial conduct would not indiscriminately fall within the reprisal prohibition.

Another problem the Regulation is sure to foster concerns the maximum punishment that can be imposed for violations, especially for hostile environment sexual harassment. A violation of a general order (the Regulation) has a maximum punishment of a dishonorable discharge and two years of confinement.¹⁷¹ While this weighty punishment may be a reason why the Regulation was enacted and why a prosecutor might choose to charge the sexually harassing conduct as a violation of the Regulation, it may not in fact serve to escalate the maximum punishment when the underlying conduct could have been charged as an independent Code offense.

The Manual for Courts-Martial provides a specific sentence limitation policy in certain cases involving orders violations under Articles 90(1) and (2). That policy is stated in a notation as follows:

[T]he punishment set forth [Dishonorable Discharge and two years confinement] does not apply in the following cases: if in the absence of the order or regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed . . . In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.¹⁷²

Thus, if hostile environment sexual harassment could be prosecuted as another offense which has a lesser maximum punishment, the issuance of a punitive order cannot be used to increase the punishment. "The policy behind footnote 5 is to prevent commission of specifically proscribed and relatively minor offenses from being punished as more serious violations of Article 92."¹⁷³ As will be discussed in section V infra, most of the hostile environment sexual harassment conduct which falls within the parameters of the Regulation can be prosecuted under established Code provisions. Many of these provisions have maximum punishments that are significantly less than the punishments permitted for Article 92(2).¹⁷⁴

There is one exception to the sentence limitations contained in the footnote 5 doctrine. That exception exists when the "gravamen of the offense" is really something more serious than the specific Code provision, and is instead reflected in the punitive order.¹⁷⁵ It could be argued that the fact that the Regulation aims at specific work related sexual misconduct is the gravamen of the offense, and thus separately punishable under the Regulation.¹⁷⁶ The better view, however, appears to be that the gravamen of most crimes prosecuted under the Regulation will be the offensive touchings, statements, or gestures, in and of themselves. A particularly compelling argument is that sexual harassment prosecuted under the maltreatment of a subordinate

provision of Article 93, UCMJ, has only a one year maximum punishment.¹⁷⁷

Since the Regulation likely will not form a basis for punishing hostile environment sexual harassment, and more egregious types of sexual harassment (quid pro quo offenses and serious assaultive conduct) have greater maximum punishments than UCMJ, Article 92(2), there is little reason to use the Regulation as a vehicle for prosecuting sexual harassment. The Regulation's provision prohibiting the making of a false accusation of sexual harassment¹⁷⁸ is similarly redundant with the more serious offense of making a false official statement in violation of Article 107.¹⁷⁹

V. PROSECUTIONS OF SEXUAL HARASSMENT UNDER EXISTING UCMJ ARTICLES

If the approach chosen by the Navy to criminalize sexual harassment directly is deficient, the only tools currently available to attack the sexual misconduct problem are the existing provisions of the UCMJ. In light of the military's continuing inability to deal in a timely and effective way with cases such as Tailhook, it is natural to inquire if the substance of existing law is adequate to deal with the "sexual harassment" problem, as that phrase is given its broadest meaning. The following section analyzes whether the UCMJ is a sufficient vehicle to use in an effort at eradicating the mistreatment of women in the military.

Conduct that in the current lexicon is sometimes considered sexual harassment ranges in severity from offensive verbal remarks (mild hostile environment), through use of position to obtain sexual favors (quid pro quo), to serious violent sexual assault crimes, including rape. Although there have been few prosecutions to date for conduct that might be seen as hostile environment sexual harassment, the UCMJ provides a comprehensive criminal system that can be used as a framework for enforcing sexual harassment prohibitions.

A. Maltreatment: The UCMJ Sexual Harassment Provision

The UCMJ article that most directly addresses sexual harassment is Article 93.¹⁸⁰ This Article was an original Code provision, and had its origins in Article 8 of the Articles for the Government of the Navy.¹⁸¹ The basic purpose in enacting the Article was to prevent officers from maltreating enlisted personnel under their charge.¹⁸²

Surprisingly, over the years there has been very little litigation over what acts constitute maltreatment. Relying on a dictionary definition of maltreatment, the Navy Board of Review in United States v. Finch stated the essential elements of the crime: "It is therefore obvious that the offense of maltreatment must be real, although not necessarily physical, cruel or inhuman, and the act or acts alleged must be toward a person

subject to the orders of the accused."¹⁸³ But the Board also recognized the inherent difficulty in attempting to define maltreatment; a difficulty quite analogous to the modern problem of defining sexual harassment:

[I]t is rather an impossibility for us to lay down a rigid rule as to what constitutes maltreatment or to say that certain acts must fall within this category as each case must normally rest upon its own bottom and the offense of maltreatment would ordinarily be a question of fact to be determined by the trial forum.¹⁸⁴

The Manual For Courts-Martial states that "[a]ssault, improper punishment and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature."¹⁸⁵ Thus, Article 93 is clearly available as a means of prosecuting sexual harassment that is manifested as assaults, quid pro quo, and certain types of hostile environment conduct. It should be noted that the Manual sexual harassment definition is not exclusive, as it uses the word "includes" prior to its listing of conduct that constitutes sexual harassment. The list could be expanded by caselaw. The most significant limitation on the use of Article 93 is that the person to whom the maltreatment is directed must

be subject to the orders of the accused. It is not necessary, however, that the maltreatment victim be subject to the UCMJ. Instead, any person over whom the accused possesses authority falls within the ambit of the prohibition.¹⁸⁶

While the Manual's sexual harassment provision has been on the books since 1984,¹⁸⁷ COMA has had few opportunities to explore the parameters of the offense. In United States v. Curry,¹⁸⁸ COMA determined that an Article 93 specification of maltreatment by a male supervisor of a barracks for attempting to obtain a "head to toe body massage" from a female sailor in exchange for him providing a job benefit preempted a violation of a general order based on the same conduct. Although the decision has no discussion or legal analysis of the maltreatment sexual harassment, it does make clear that Article 93 can be a basis for prosecuting the quid pro quo type of sexual harassment.

The only reported decision to discuss Article 93 in any depth as a means for prosecuting sexual harassment is United States v. Hanson.¹⁸⁹ Significantly, this was a hostile environment prosecution where the accused was an Air Force officer supervising various male and female enlisted personnel. Over a period of years, Captain Hanson made numerous sexually explicit remarks and gestures in his work dealings with his subordinates.¹⁹⁰ The accused claimed to have done these things as jokes and techniques to establish good relations with his subordinates, but the subordinates testified that his words and actions were "disruptive, embarrassing and vulgar."¹⁹¹

Rejecting the accused's "joke defense," the Court noted that maltreatment is a general intent crime and "occurs when the treatment, viewed objectively, results in physical or mental pain or suffering and is abusive or otherwise unwarranted, unjustified and unnecessary for any lawful purpose."¹⁹² The Court went on to explain how hostile environment type conduct can rise to criminality under Article 93:

Assuming arguendo that the appellant was merely joking and only intended to set up "informal and effective" office relationships, how can his conduct rise to the level of actionable offenses? Appropriate conduct can only be discerned by examination of the relevant surrounding circumstances. For example, what is condoned in a professional athletes' locker room may well be highly offensive in a house of worship. A certain amount of banter and even profanity in a military office is normally acceptable and, even when done in "poor taste," will only rarely rise to the level of criminal misconduct. But just as Justice Stewart knew obscenity when he saw it [Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)], we find it clear from the totality of the appellant's actions that his conduct was so abusive and unwarranted as to support his conviction for maltreatment.

By our ruling today, we do not hold that any single offensive comment to or action against a military subordinate will necessarily constitute a criminal offense. We do find, however, that the appellant's conduct amounts to maltreatment as envisioned by Article 93. Over a two and a half year period, he engaged in a course of conduct that evinced callous disregard for the sensitivities and self-esteem of his military subordinates. Despite the contentions of the captain-appellant that he was merely "joking," the noncommissioned officer victims of his abusive conduct were entitled to protection from such offensive conduct.¹⁹³

Thus, hostile environment sexual harassment must be analyzed under an objective standard looking at the totality of the circumstances. The intent of the perpetrator is not controlling, and the reactions of the "victims" are of critical importance. Furthermore, the Court indicated that normally one instance of offensive behavior will not be sufficient to commit the crime. Instead, (like the 2 1/2 year course of conduct by Hanson) the conduct will normally have to be pervasive and repeated, similar to the standard developed by the Supreme Court for Vinson.¹⁹⁴

The only other case where Article 93 has been used as a vehicle for prosecuting sexual harassment is United States v.

Cantu.¹⁹⁵ On appeal the case involved multiplicity issues stemming from various acts of sexual harassment by a male sergeant who abused various female Marines while he was a school instructor. He was convicted of violating a local order, fraternization, and maltreatment for "making comments of a sexual nature." The maltreatment conviction was affirmed, but unfortunately, the decision did not discuss the nature or extent of the hostile environment offense.

The perceived problems with utilizing Article 93 are its expressed limit of protecting only those who are directly subject to the orders of the accused, and the lack of a clear standard as to what hostile environment activities constitute maltreatment. As already discussed, this latter problem for the maltreatment Article is dwarfed by the same problem for the even more expansive concept of the hostile environment contained in the Regulation.¹⁹⁶ Possibly the latter issue can be resolved with more cases fleshing out the standard for Article 93. The Tailhook facts show the former limitation of the Article since none of the Tailhook victims were likely subject to the orders of the gauntlet operators. Furthermore, the survey sexual harassment research has shown that the vast majority of harassment occurs among co-workers.¹⁹⁷ Although a limitation, it may not be a major problem as there are numerous articles in the UCMJ that deal with sexually assaultive conduct and other milder forms of harassment. The only real legal problem with Article 93 is that the maximum punishment for this Article, as presently

delineated by the President, is one year of confinement.¹⁹⁸ This limitation could easily be changed by presidential action.¹⁹⁹ The other deficiency with the Article is that it simply has not been used. This may reflect the sociological problems the military has had in dealing with sexual harassment, but it is not indicative of a technical problem with the law.²⁰⁰

B. Serious Violent Sex Crimes Against Women

Sexual harassment that reaches the most severe degree encompasses the criminal activity of rape and sexual assault. The UCMJ, through Articles 120 (rape and carnal knowledge), 125 (sodomy), 128 (assault), and 134 (indecent assault), provides an exhaustive structure to prosecute conduct that can be seen as the extreme manifestations of sexual harassment. To characterize these crimes as sexual harassment may in fact minimize the severity of the misconduct. Behavior that rises to the level of these offenses is criminal, in and of itself, fully apart from the fact that it may have grown out of a duty or work relationship (the defining characteristic of Title VII sexual harassment). Still, the reported cases are replete with sex offenses that arose in a context that fit into the standard definitions of sexual harassment. All rapes by supervisory personnel are obviously "unwelcome" sexual advances that have as their effect an unreasonable interference with a subordinate's work performance or create a hostile environment.

In United States v. Clark,²⁰¹ the accused, a male sergeant first class (E-7), ordered a female private (E-1) basic trainee, whom he was supervising, into a secluded, pitch black room. He instructed the private to take off her trousers and bend over, whereupon he engaged in sexual intercourse with her. Later he told her not to tell anyone what he had done or they would both get in trouble, and that they would have sex again the next time she was assigned to work for him.²⁰² The Clark appeal involved whether or not the passive acquiescence of the victim to the conduct of the military superior was sufficient to invoke the constructive force doctrine for rape. Although a split decision (two concurring opinions and a dissent), the case lends great support for an assertion that the use of superior rank coupled with a physically coercive environment may be sufficient to prove rape even when there is little or no use of physical force or manifestations of lack of consent by the victim. Potentially the most far-reaching language of the lead opinion by Judge Crawford is the following:

We join wholeheartedly in the holding of the court below "that the appellant cannot create by his own actions an environment of isolation and fear and then seek excusal from the crime of rape by claiming the absence of force," 32 M.J. at 610, especially where, as here, passive acquiescence is prompted by the unique

situation of dominance and control presented by appellant's superior rank and position.²⁰³

In a similar case, United States v. Bradley,²⁰⁴ a drill sergeant of a recruit used his superior rank and position to coerce sexual intercourse from the recruit's youthful wife. The accused threatened the wife that he would impose Article 15 punishment on the recruit unless the wife engaged in sexual intercourse with him. Even though the offense occurred off base and against a civilian, it was still a form of quid pro quo sexual harassment.²⁰⁵

While the Clark and Bradley decisions press the outer limit for finding the force and lack of consent necessary for rape when a superior utilizes his position of authority to obtain sex, there are numerous other reported cases of rape and sexual assault that can be seen as being sexual harassment. United States v. Mathai²⁰⁶ (sergeant orders drunk private to "follow him" and rapes her after she passes out); United States v. Frye²⁰⁷ (male sergeant convicted of indecent assault after posing as CID agent and obtaining sexual favors from a private in exchange for not arresting her for drug offense); United States v. Jackson²⁰⁸ (platoon sergeant in charge of quarters indecently assaulted subordinate female private in barracks).

The crime of rape under the UCMJ is a capital offense.²⁰⁹ The maximum punishments for other less serious sexual assault crimes, such as simple assault, assault consummated by battery,

assault with intent to commit rape, and indecent assault, all impose significant sanctions.²¹⁰ Clearly, prosecutors would prefer to use these punitive provisions to prosecute this type of sexual harassment even if the Regulation was available.

C. Abusing Positions of Authority To Commit Sexual Harassment

Violent sex offenses are most indicative of sexual harassment when they occur in the work or duty environment, or when positions of authority are abused. The UCMJ has three articles available for prosecuting sexual harassment offenses when the harassment involves abuse of authority. Those are fraternization under Article 134, conduct unbecoming an officer under Article 133, and violating general orders involving standards of conduct under Article 92.

Fraternization is the unlawful association between servicemembers of different ranks in violation of a custom or tradition of the military service.²¹¹ While the scope of conduct that is prohibited varies between the services, and the validity of the prohibitions is subject to great debate,²¹² it is clear that throughout the services, at a minimum, sexual relations between servicemembers where there is a supervisory or chain of command relationship is prohibited.²¹³ Thus, even in situations where there is legal consent (and perhaps even "welcome" sexual advances), much sexual activity that poisons the work environment

can be prosecuted as fraternization.²¹⁴ The fraternization prohibition will often be even broader than Title VII prohibitions.

Frequently sexual harassment stems from males in positions of authority abusing that power. In the military those males will often be officers. As such, they must abide by the general prohibition against conduct unbecoming an officer contained in Article 133. This statute has a vast sweep and it has long been used to prosecute conduct that today is seen as sexual harassment. As an example, in United States v. Parini,²¹⁵ an officer was prosecuted for two specifications of conduct unbecoming for attempting to obtain sexual favors from female subordinates in return for him writing favorable performance evaluations. The Court had no trouble finding this quid pro quo form of sexual harassment to be violative of Article 133. More recently, in United States v. Kroop,²¹⁶ a lieutenant colonel was convicted of conduct unbecoming an officer for making sexual advances and verbal comments of a sexual and intimate nature to a married officer under his command, thereby creating "an intimidating, hostile, and offensive environment." The Air Force Court of Military Review rejected the accused's claim that the specification failed to state an offense, even though it reversed his conviction because the accused refused during the providence inquiry to admit that his conduct created a hostile environment for the subordinate.²¹⁷ Thus, Article 133 is an excellant substantive device for enforcing criminal sanctions for conduct

in the nature of hostile environment sexual harassment. The statute provides a flexible means of prosecuting sexual harassment and it is anchored in familiar and approved military law doctrine.

Servicemembers also are obligated to conform their conduct to certain standards of conduct for government employees that prohibit using one's official position for personal gain.²¹⁸ These standards prohibit using the powers of office to obtain sexual favors, which is in essence the quid pro quo aspect of sexual harassment. Additionally, most training commands issue punitive regulations which forbid social fraternization, including sexual relations, between the training staff and the trainees. Such regulations protect vulnerable subordinates from coercion by those in positions of authority.²¹⁹ The intimate relationship between officer conduct, fraternization, sexual harassment, and maltreatment of subordinates is thus covered in a comprehensive scheme by the UCMJ to protect unit morale, cohesion, and discipline.²²⁰

D. Miscellaneous Provisions

Article 127 (extortion) is the UCMJ provision against threat type sexual harassment. It provides that any threats communicated to another in order to obtain something of value, an acquittance, or an advantage is a crime. In United States v. Hicks,²²¹ COMA specifically rejected a contention that the thing

of value or advantage was limited to a pecuniary or material gain. Threats geared to obtaining a sexual favor or even items that are not overtly sexual, but satisfy the subjective sexual desires of the perpetrator, can form the basis for an extortion sexual harassment prosecution. Obtaining some sexual "thing of value" could also serve as a basis for a bribery or graft conviction under Article 134 if the harasser occupies an official position and utilizes it for his private prurient benefits.²²²

The UCMJ also provides a framework for prosecuting less pernicious, but undoubtedly, more common forms of hostile environment sexual harassment. Articles 89 and 91 prohibit subordinates from being disrespectful in behavior or language to their superiors.²²³ In United States v. Dornick,²²⁴ an enlisted male was convicted of disrespect when he greeted a female officer with the words "Hi sweetheart." The Court's finding of unlawful "sexist familiarity"²²⁵ provides a basis for prohibiting a broad spectrum of offensive workplace comments and behavior.

As was previously discussed,²²⁶ the vast majority of sexual harassment involves offensive remarks between co-workers. In an area that civilian society grants special protection under the First Amendment, Article 117 prohibits the use of "provoking" or "reproachful" words or gestures. These two terms are defined as those "words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances."²²⁷ In the military context, the amount of

provocation that can lead to a breach of the peace is rather low.²²⁸ The words used need not be a challenge to do violence, but instead must merely have a "tendency to lead to quarrels, fights or other disturbances."²²⁹ With such a low standard, many workplace remarks and gestures would seem to fall within the ambit of this statute.

An even broader offense is the Article 134 prohibition against the use of "indecent language."²³⁰ The expansive applicability of this provision can be seen in the analysis of several recent child abuse cases. In United States v. French,²³¹ COMA was asked to decide what constitutes indecent language under the Code. The accused had sexually abused his young stepdaughter and he was charged, inter alia, with an indecent language offense for asking her if he could climb into bed with her. The Court acknowledged that words can be either per se indecent or indecent because of the surrounding circumstances in which they are uttered. It established the following as the test for whether the words spoken are criminal:

In assessing whether indecent language is framed adequately in a specification, the courts below have recognized a number of factors, including: "fluctuating community standards . . . , the personal relationship existing between a given speaker and his auditor, . . . and the probable effect of the communication" as deduced from the four corners of the specification. A

test which has been used is "whether the particular language is calculated to corrupt the morals or excite libidinous thoughts." We adopt this test as an appropriate determination for indecent language.²³²

Additionally, for this crime there is no requirement that the words be spoken with an intent to gratify the speaker's sexual desire. Instead, they need merely communicate an indecent message.²³³

Utilizing this standard, calling a female child a "bitch" and a "cunt" is indecent,²³⁴ but calling a female Marine a "swine" is not.²³⁵ Similarly, asking a woman to meet for a date at a hotel was not indecent, but offering \$50 for a date at a hotel was indecent.²³⁶ It is thus readily apparent that much of what is often deemed verbal sexual harassment can be appropriately analyzed under the developed constitutional and military law for indecent language.²³⁷

Analogous to the indecent language offense is the "indecent acts" offense, also under Article 134.²³⁸ Consensual, but public, sexual conduct, such as intercourse and fellatio, are criminalized under this provision.²³⁹ Taking indecent photographs,²⁴⁰ having an enlisted person pose in the nude,²⁴¹ dancing naked with children,²⁴² and consensual "heavy petting" between a married officer and a 16 year old military dependent²⁴³ are examples of acts that have been determined to be indecent.

Certain types of conduct that may be viewed as sexual harassment are also regulated by some miscellaneous Article 134 offenses. At Tailhook 91 there were numerous incidents of indecent exposure. This type of conduct is clearly punishable under Article 134.²⁴⁴

The sexual harassment conduct that can be perpetrated is limited only by the potential perversity of the human mind, often colored by the effects of alcohol. Fortunately, military law provides a flexible mechanism in Article 134 that proscribes all conduct (assuming sufficient due process notice) that is service discrediting or prejudicial to good order and discipline. This broad prohibition has been described as follows:

Article 134 has two categories of proscribed conduct:

1—that which is "illegal under the common law or statutes"; and

2—"that which—however eccentric or unusual" is not unlawful in a civilian community but becomes illegal "solely because, in the military context, its effect is to prejudice good order or to discredit the service."²⁴⁵

Under the circumstances in United States v. Guerrero,²⁴⁶ the mere public display of cross-dressing by a servicemember was service discrediting. As this case demonstrates, much conduct that would not be criminal in the civilian world may be deemed

criminal in the military and prosecuted as a violation of Article 134.

Finally, the UCMJ provides one other avenue for proscribing conduct that some may view as sexual harassment. Servicemembers can be given lawful orders to refrain from certain conduct, violations of which are punishable under Articles 90-92. Thus, an officer or superior can order a servicemember to refrain from making remarks, gestures, or conduct that someone finds offensive if such order reasonably relates to the recipient's military duties. A servicemember could be ordered not to ask another out on dates after previously being refused, not to use certain nicknames or language that an individual finds offensive, or not to display certain materials (magazines, calendars) in the workplace. This is a flexible means of giving notice to a servicemember of what conduct constitutes sexual harassment, protecting the sensibilities of individuals that at first blush might be overly sensitive, and clearly identifying that a violation has occurred.

The UCMJ is a comprehensive code that has constitutionally approved provisions that cover the full array of criminal sexual harassment conduct in the military. Its provisions clearly prohibit both quid pro quo and hostile environment sexual harassment. Indeed, the reach of the criminal sanctions and the possible severity of the punishments go far beyond the deterrence of Title VII's civil liability. In light of the serious consequences of prosecutions for offenses that are in the nature

of sexual harassment, it is essential that the elements of these established offenses be satisfied before an offender be labeled and punished as a criminal.²⁴⁷

VI. THE PROPOSAL TO ADOPT A SPECIFIC SEXUAL HARASSMENT STATUTORY PROHIBITION

An additional approach to combatting the sexual misconduct problem (which has been explored preliminarily) is the passage of an amendment to the UCMJ to directly criminalize sexual harassment. The obvious practical difficulty is that this approach requires both congressional and presidential action. Nevertheless, this section of the paper will explore one version of this approach that is currently being considered as a solution to the military's sexual harassment problem.

In the Secretary of the Navy's June 12, 1992, memorandum calling for the drafting of a specific Code article outlawing sexual harassment,²⁴⁸ he noted several benefits from such an approach. First, he contended that the lack of a specific comprehensive provision to prosecute sexual harassment with tailored appropriate maximum punishments creates both confusion over the correct means for prosecuting these crimes and disparate treatment for offenders. Second, he equated the problem of sexual harassment to the earlier drug abuse problem, which he implied was not seriously addressed until the enactment of Article 112a. Finally, he stated that a specific statute would facilitate a better collection of data on the number of sexual

harassment offenses, thereby providing a gauge for assessing the progress made in rectifying the sexual harassment problem.²⁴⁹ Each of the Secretary's points is undoubtedly valid to varying degrees, and they collectively present a strong case for a substantive change to the law to fight sexual harassment effectively.

While the Navy has borne the brunt of the adverse publicity on sexual harassment, it is beyond cavil that the problem exists in all of the services. It should be remembered that one of the primary purposes in enactment of the UCMJ was uniformity of the law for all servicemembers.²⁵⁰ With ever increasing "jointness," this rationale for a unified application of the law is even more compelling.²⁵¹ Additionally, many of the constitutional problems concerning vagueness and the First Amendment are ameliorated when Congress, as opposed to a military department head (or even some subordinate officer with authority to issue general orders), acts. The following section will briefly examine the legislation drafted in response to Secretary Garrett's proposal (Appendix B), especially in the context of the problems perceived to be created by the Regulation.

Initially, the proposed legislation²⁵² is more comprehensive and legalistic than the Regulation. Even a cursory examination reveals that the legislation is a legal document geared at structural and technical legal issues, whereas the Regulation is a policy and sociological document.²⁵³ A basic problem with the Regulation is that its expansive punitive reach is not

complemented with the technical and coherent legal framework to implement the overall Regulatory prohibitions adequately. The statute's technical precision²⁵⁴ would eliminate much confusion and make it a preferable way to implement a sexual harassment ban.

Next, quid pro quo sexual harassment is clearly defined in one single subparagraph of the proposed statute.²⁵⁵ It has a specific intent requirement that the conduct be done with the intent to obtain sexual favors. Most importantly, the statutory offense stands on its own without need to resort to borrowed concepts from employment discrimination law, which unfortunately, are essential for making any sense of the regulatory offense.

Another flaw in the Regulation is its failure to state a clear, constitutionally acceptable standard for hostile environment sexual harassment. Although this is also a problem in the statute, it has several components that ameliorate this deficiency. First, the statute itself²⁵⁶ and the proposed Manual explanation²⁵⁷ make it perfectly clear that the hostile environment is determined based on a completely gender-neutral, objective standard. The third party "unwelcomeness" subjective analysis is specifically rejected. Instead, the subjective perceptions of victims and others, along with the intent of the perpetrator, are merely part of the totality of the circumstances.²⁵⁸ This is a workable legal standard, something woefully missing in the Regulation.

Because of the inherent ambiguity of much of hostile environment sexual harassment, the statute creates a permissive evidentiary inference or presumption. If a person is properly informed by either a "victim" of sexual harassment or by a superior that their conduct is creating a hostile environment, and they subsequently repeat the same or similar conduct, a rebuttable presumption exists that a hostile environment has been created. This is a built-in notice provision that does much to allay the lack of notice concerns that are so pervasive in the regulatory hostile environment offense. The provision would encourage victims to report and confront offensive individuals and at the same time provide the offender with an opportunity to correct his misdeeds. It is unlikely that any "yellow zone" conduct could be prosecuted without first utilizing this notice provision.

Finally, as far as the notice/ambiguity problem is concerned, much of the hostile environment sexual harassment in the statute is aligned with the service discrediting or conduct prejudicial to good order and discipline concepts of the UCMJ.²⁵⁹ To create a hostile environment the perpetrator must act in a way that generally satisfies the criminality standard of Article 134. The satisfaction of this standard will likely comply with the vagueness and notice requirements of Parker v. Levy. Tying creation of the hostile environment to the idea of service discrediting or conduct prejudicial specifically aligns the statutory sexual harassment crime to the special disciplinary

needs of the military that have been so critical in validating otherwise inherently vague prohibitions of conduct under Articles 133 and 134.

The statutory provision on hostile environment sexual harassment also incorporates the "severe and pervasive" requirement taken from Vinson, that was apparently ignored in the Regulation.²⁶⁰ The conduct of the accused must be severe and pervasive enough that it prejudices discipline or discredits the service. The joining of these two concepts adds significant content to a concept that is otherwise highly ambiguous. While the statutory hostile environment offense is certainly not without some problems in defining the hostile environment, it does provide an objective standard because it is based on a concept traditionally understood in military law. Anchored within the Article 134 standard, it stands on much firmer ground than the Regulation.

The statute is also far less intrusive on controlling hostile environment speech than the Regulation. The statute on its face²⁶¹ only regulates hostile environment conduct, whereas the Regulation directly prohibits speech. Insofar as it only restricts speech incidental to regulation of expressive conduct, it is subject to the far less demanding test of United States v. O'Brien.²⁶² The only direct regulation of speech is when the speech is so severe and pervasive that it creates the hostile environment as demonstrated by behavior that meets the conduct prejudicial or service discrediting standard.²⁶³ Speech airing

sexist political sentiments would not appear to meet the severe and pervasive requirement. Furthermore, the inherent vagueness problem that Professor Browne identified as a major problem with Title VII hostile environment speech restrictions²⁶⁴ are allayed by the greater certainty of the standard.

The other speech deficiency identified by Professor Browne is the chilling effect on speech from the censorship deriving from employer liability for the harassment of employees.²⁶⁵ This problem is endemic in the Regulation and exists to some extent in the statute. The degree of the problem is far less serious in the statute because the respondeat superior crime in the statute is more sharply defined, and the standard for criminality is heightened. The superior commits this crime under the statute only if he fails to take appropriate action either willfully or through culpable negligence.²⁶⁶ While the statute has the same knowledge component as the Regulation regarding the violations of subordinates, the statute describes the duty that it imposes (taking appropriate action) and provides a standard for determining violations of that duty (willfulness or culpable negligence). These aspects are completely missing in the Regulation. Thus, the statute in this area is not only less ambiguous, it is also far less likely to cause the censorship/overreaching from supervisors who are concerned about their own exposure to criminal liability.²⁶⁷

In sum, the statute has far fewer obvious legal deficiencies than the Regulation.²⁶⁸ It has greater technical precision than

the Regulation and would be much more workable. It is more self-contained with less reliance on concepts borrowed from employment discrimination law; concepts that become distorted when transposed into the criminal arena. The uniform applicability of the statute to the entire military is preferable to a piecemeal or hodgepodge approach between the services. Finally, the statute will provide a data basis for gauging the extent of sexual harassment offenses, and the progress made in rectifying the problems. While the statutory approach may be superior to the Regulation drafted by the Navy, the question remains, however, whether any direct criminalization of sexual harassment is beneficial or necessary.

VII. CONCLUSION

The main effect of directly criminalizing sexual harassment is to outlaw the admittedly amorphous area of hostile environment conduct.²⁶⁹ Doing this, however, creates numerous legal and practical difficulties. Problems arise initially because the criminalization is based on the transfer of a civil standard into the military criminal law. Although Title VII terminology and concepts have been utilized, so far they have failed to provide an unambiguous, constitutionally viable standard for criminality. The artificial assimilation of civil employment discrimination law concepts into a regulation defining a criminal act fails to provide proper notice of what is prohibited conduct because civil

law sexual harassment is inherently aligned with the subjective feelings of individuals who perceive the alleged criminal conduct or words. Thus, the very same conduct might be acceptable or criminal depending upon the perceptions of two different observers. Such vagaries are neither workable nor are they likely to pass constitutional muster.

An additional major constitutional problem with the criminalization of sexual harassment is that it attempts to regulate offensive speech. By precluding a wide array of speech, and only one type of politically, offensive speech, the sexual harassment prohibition is subject to First Amendment challenges under various theories.

Other potential problems with criminalizing a civil concept are not as yet readily apparent.²⁷⁰ What is obvious is that such criminalization is unnecessary because the UCMJ has an expansive set of criminal prohibitions that cover almost all imaginable truly criminal conduct that fits within the rubric of being sexual harassment. These criminal statutes have already passed constitutional muster, provide adequate notice to satisfy the requirements of due process, and have a long history which is available for bench and bar to utilize during prosecution of real sexual harassment crimes. Resort to special regulations or statutes was not needed to combat racial discrimination, and they are unnecessary to combat sexual harassment.

Sexist remarks, tasteless jokes, and other mild forms of hostile environment sexual harassment that receive expanded

coverage beyond the traditional provisions of the UCMJ from the efforts to directly criminalize hostile environment conduct, are not at the heart of the problem of the mistreatment of women in the military. Instead, the problem has been in failing to effectively recognize that in many cases, like those arising in Tailhook, the mistreatment of women constitutes serious assaultive crimes that must be prosecuted accordingly.

Ironically, direct criminalization will likely cause two opposite, but yet related, damaging reactions to resolving the mistreatment of women in the military. First, since the Regulation sweeps far too broadly in criminalizing conduct, the focus of attention changes from the truly criminal conduct that must be eliminated to debates about the type of conduct that is "sexual harassment," and the overreaction of the Regulation.

Second, because of the highly charged nature of the sexual harassment issue, the political agenda of interested parties, the inherently ambiguous and subjective nature of hostile environment sexual harassment, and the dynamics of fear of being criminally tolerant of subordinates' sexual harassment, an overaggressive enforcement of the Regulation will inevitably occur. Individual rights will be victimized, and this misuse of the legal system will strengthen the resolve of those who are not serious about focussing on the main issue of real crimes against women in the military. Thus, by focussing on "yellow zone" type conduct, the real problem will be obscured because all the energy of the participants in the controversy will be focussed on the periphery.

None of the problems that the military, especially the Navy, has encountered in its treatment of women stem from the inadequacy of its laws or its policies against sexual harassment. The anti-sexual harassment policies have been in effect throughout the entire period when the most egregious and publicized abuses have occurred. These are more than adequate vehicles to prosecute the assaults, indecent exposures, and drunken conduct unbecoming officers for all past and future Tailhook type incidents. Education, training, and administrative measures to resolve the sociological and institutional aspects of discrimination against women are being widely implemented. Women must be encouraged to report misconduct and commands must timely investigate and adequately dispose of charges. The law as presently constituted, however, is more than adequate to support the policies against sexual harassment.²⁷¹ Extensive substantive changes are not needed. What has been missing, and what is essential, is the leadership, dedication, and political will necessary to expose and timely resolve the problems. Without this type of dedication, no existing or future laws can do the job. With it, the existing legal tools for eradicating sexual mistreatment of women are in place and fully operational.

It is recommended that the Navy revoke the punitive aspect of its Regulation, and that the other services resist any movement towards direct criminalization of sexual harassment. If political pressure mandates criminalization, a statutory measure like the proposed Article 93a is preferable to service

regulations. A statute provides uniformity, increased legitimacy, more content, and less ambiguity. Such a statute decreases, but does not eliminate, the problems of infringement of protected speech and the ambiguous criminal standard.

Tinkering with the substantive law is simply not the answer to resolving the sociological problem of mistreatment of women. Instead, the law as presently constituted will work effectively when there is displayed the resolve to do justice and enforce current policies and standards for equal treatment of women in the military.

1. In naval aviation, a "tailhook" is the grappling device used to help stop a fixed-wing aircraft landing on an aircraft carrier. The term was adopted by the Tailhook Association as the name for their professional organization dedicated to promoting naval aviation. Because of the highly publicized scandal involving sexual abuse by males against females growing out of the Tailhook Association's convention which occurred in Las Vegas in September 1991, the term is now a shorthand description for the events involving that scandal. Throughout this paper it will be used in that context.
2. The term "sexual harassment" commonly is used to designate a wide-range of mistreatment of women. However, the term has both a technical legal definition developed through employment discrimination law, and a more expansive lay person's usage which includes criminal assaultive conduct.
3. During the course of those hearings, Anita Hill alleged she was sexually harassed in the workplace by Justice Thomas.
4. Dep't of Navy, Secretary of the Navy Instr. 5300.26B, Policy on Sexual Harassment (6 Jan. 1993) [hereinafter the Regulation] (attached hereto as Appendix A).
5. The punitive reach of the Regulation extends to all active and reserve Navy and Marine personnel, as well as midshipmen at the

United States Naval Academy or in the Reserve Officer Training Corps. See generally UCMJ art. 2.

6. In June 1992, the Secretary of the Navy requested that a separate statute prohibiting sexual harassment be drafted as a proposed amendment to the UCMJ. Memorandum from H. Lawrence Garrett III, Secretary of the Navy to the Judge Advocate General of the Navy (June 12, 1992) (on file with author). In response, a proposed change to the law was drafted (attached hereto as Appendix B). To date, it has not been submitted to Congress. With the continued negative publicity over sexual harassment in the Navy, and the apparent linkage of this issue to the highly controversial issue of homosexuals in the military, there is a possibility that such a change to the UCMJ may be submitted.

Dep't of Air Force, Air Force Reg. 30-2, Social Actions Program, (18 Apr. 1986) (C2, 25 Sept. 1992) [hereinafter AFR 30-2], also purports to be a punitive regulation. This regulation contains, inter alia, Air Force policies prohibiting arbitrary discrimination based on age, color, national origin, race, ethnic group, religion, or sex. Id. at para. 6-3. Included as types of arbitrary discrimination are use of disparaging terms, personal discrimination, and institutional discrimination against any of the above ennumerated protected groups. In a change to this regulation on September 25, 1992, sexual harassment is specifically included as a type of prohibited sex discrimination. Id. at para. 6-4b. Dicta in United States v. Kroop, 34 M.J. 628,

635 n.2 (A.F.C.M.R. 1992), implies that sexual harassment can be prosecuted as a violation of this order. At this time there have not been many, or perhaps any, prosecutions, as there are no reported cases dealing with the regulation on sexual harassment or other incidents of sex discrimination. The order was used in *United States v. Way*, No. S28590 (A.F.C.M.R. 20 March 1992), to prosecute racial prejudice stemming from saying racial slurs. Although the opinion had little legal analysis, it did hold that the conviction could not be sustained because the regulation was, inter alia, "vague." *Id.* slip op. at 5. Both the Navy and Air Force regulations contain essentially the same sexual harassment prohibitions, in that their definitions of sexual harassment are identical and both derive from employment discrimination law.

7. 42 U.S.C. § 2000e-2(a)(1)(1988)(emphasis added).

8. 29 C.F.R. § 1604.11(a)(1992).

9. See e.g. *Kotcher v. Rosa & Sullivan Appliance Center*, 957 F.2d 59, 62 (2d Cir. 1992); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990).

10. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1972), cert. denied, 406 U.S. 957 (1972).

11. 477 U.S. 57 (1986).

12. Even though the EEOC Guidelines do not have the force of

law, the Court utilized the *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), proposition that the interpretation of a statute by an enforcing agency is worthy of great judicial consideration. 477 U.S. at 65.

13. Id.

14. Id. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

15. Id. (quoting Henson, 682 F.2d at 904).

16. Id. at 68.

17. See e.g. *Burns v. McGregor Electronics Industries, Inc.*, 955 F.2d 559, 564 (8th Cir. 1992); *Hall v. Ticknor*, 842 F.2d 1010, 1014 (8th Cir. 1988).

18. 477 U.S. at 72-3.

19. *Guess v. Bethlehem Steel*, 913 F.2d 463, 464 (7th Cir. 1990); Burns, 955 F.2d at 564.

20. Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991).

21. No. 3-89-0557, 1991 U.S. Dist. Lexis 20940 (M.D. Tenn. Feb. 4, 1991) (adopting Magistrate's Report & Recommendation, 1990 U.S. Dist. LEXIS 20115 (Nov. 28, 1990)), aff'd, 976 F.2d 733 (6th Cir. 1992) (decision without published opinion), cert. granted, No. 92-1168, 1993 U.S. LEXIS 1937 (Mar. 1, 1993).

22. Pub. L. No. 92-261, 86 Stat. 111 (codified as amended at 42 U.S.C. § 2000e-16).

23. See e.g. Gonzalez v. Department of the Army, 718 F.2d 926 (9th Cir. 1983); Roper v. Department of the Army, 832 F.2d 247 (2d Cir. 1987). Contra Hill v Berkman, 635 F. Supp. 1228 (E.D. N.Y. 1986) (stating minority view that Title VII is available for uniformed personnel to assert sexual harassment claims).

24. 462 U.S. 296 (1983)

25. 340 U.S. 135 (1950).

26. Currently, Memorandum from Frank Carlucci, Secretary of Defense to multiple addressees within DOD (July 20, 1988) (on file with author) [hereinafter SECDEF Memo of 20 July 88], and Dep't of Defense, Directive 1350.2, DOD Military Equal Opportunity Program (23 Dec. 1988) formulate overall policy opposing sexual harassment for uniformed personnel. See also Dep't of Army, Reg. 600-20, Army Command Policy, para. 6-4, (30 Mar. 1988) (C2, 1 Apr. 1992); AFR 30-2, para. 6-4; SECNAVINST 5300.26B.

27. See supra notes 4-6, and accompanying text.

28. Diana W. Smith & Debra L. Mowery, Women in Combat: What Next? 5 (Nov. 15, 1992) (unpublished manuscript, on file with the Naval War College, Newport, R.I.).

29. Mady W. Segal & David R. Segal, Social Change and the Participation of Women in the American Military, in Vol. 5, Research in Social Movements, Conflicts, and Change 244, 247 (Louis Kriesberg ed., 1983).

30. Id.

31. Department of Defense Appropriation Authorization Act, 1976, PL 94-106, § 803, 89 Stat. 537 (1975).

32. Memorandum from Office of the Assistant Secretary of Defense (Force Management and Personnel) entitled "Women in the Military" (Jan. 27, 1993) (on file with author).

33. Id.

34. The only statutory combat restriction still in effect is 10 U.S.C. § 6015 (1988), prohibiting women from serving on combat vessels. Regulations in each of the services, however, prohibit women from serving in various combat billets. See Dep't of Army, Reg. 600-13, Army Policy for the Assignment of Female Soldiers, (27 Mar. 1992), Dep't of Air Force, Air Force Reg. 35-60, Combat Exclusions for Women (18 Aug. 1989), Dep't of Navy, Secretary of the Navy Instr. 1300.12A, Assignment of Women Members in the Department of the Navy, (20 Feb. 1989), and Headquarters, Marine Corps, MCO 1300.8P, Encl. (11), Marine Corps Personnel Assignment Policy (12 Aug. 1988). DOD statistics state that 90% of Army job skills comprising 61% of the force are open to women, 83% of Navy

job skills comprising 60% of the force are open to women, 80% of Marine job skills comprising 20% of the force are open to women, and 95% of Air Force job skills comprising 97% of the force are open to women. Memorandum from Office of the Assistant Secretary of Defense, supra note 32.

35. For general accounts of the Commission's recommendations see Women in Combat: Maybe? Yes, N. Y. Times, Nov. 28, 1992, at I18; Melissa Healy, Ban Urged on Women in Most Combat Roles, L.A. Times, Nov. 4, 1992, at A1; Rowan Scarborough, Clinton Likely to Face Women in Combat Decision, Wash. Times, Nov. 18, 1992, at A3.

36. See Melissa Healy, Navy Secretary Backs Women in Combat Role, L.A. Times, Jan. 7, 1993, at A15.

37. Encyclopedia American, Annual, 579 (1981).

38. Kathleen A. Krohne, The Effect of Sexual Harassment on Female Naval Officers, 176 (1991) (unpublished Ed.D. dissertation, University of San Diego).

39. Office of Merit Systems Review and Studies, U.S. Merit System Protection Board, Sexual Harassment in the Federal Workplace 2 (1981) [hereinafter MSPB (1981)].

40. Id. at 4, 26.

41. Id. at 4-5.

42. Id. at 11.

43. Office of Merit Systems Review and Studies, U.S. Merit System Protection Board, Sexual Harassment in the Federal Workplace: An Update 1-2 (1988) [hereinafter MSPB (1988)].

44. MSPB (1981), supra note 39, at 75-79.

45. MSPB (1988), supra note 43, at 39-40.

46. Patricia J. Reily, Sexual Harassment in the Navy 33-34 (1980) (unpublished Master's thesis, Naval Postgraduate School, Monterey, Cal.).

47. William Canny, Sexual Harassment Within the USAF Enlisted Force, viii (April 1986) (unpublished manuscript, on file with the Air Command and Staff College, Air University, Maxwell AFB, Ala.).

48. Jon S. Wheeler, Sexual Harassment: A Military Response to a Military Problem 18 (Feb. 1983) (unpublished manuscript, on file with the Air War College, Air University, Maxwell AFB, Ala.).

49. Don Hurst, 75% of Army Women Cite Sexual Harassment, Army Times, Apr. 5, 1982, at 1.

50. Melanie Martindale, Sexual Harassment in the Military: 1988 1 (Sept. 1990) (unpublished report, on file with the Defense Manpower Data Center, Arlington, Va.).

51. *Id.* at 4-5.
52. John B. Pryor, Sexual Harassment in the United States Military: The Development of the DOD Survey, 8 (Sept. 1988) (unpublished manuscript, on file with the Defense Equal Opportunity Management Institute, Patrick AFB, Fla.).
53. Martindale, supra note 50, at 11.
54. *Id.* at 15.
55. *Id.* at 14.
56. *Id.* at 36-38.
57. Amy L. Culbertson et al., Assessment of Sexual Harassment in the Navy: Results of the 1989 Navy-wide Survey 7-8 (Mar. 1992) (unpublished manuscript, on file with the Navy Personnel Research and Development Center, San Diego, Cal.).
58. *Id.* at 9.
59. *Id.* at 9-10.
60. *Id.* at 12.
61. *Id.* at 15.
62. *Id.* at 17.
63. Memorandum from Carl J. Dahlman, Deputy Assistant Secretary

of Defense to Assistant Secretaries of the Army, Navy, and Air Force for Manpower and Reserve Affairs (Jan. 14 1993) (on file with author).

64. Memorandum from Dick Cheney, Secretary of Defense to all major DOD components (July 12, 1991) (on file with author).

65. As an example, the 1992 Navy annual report included the following laundry list of actions taken to combat sexual harassment: (1) mandatory administrative processing for a substantiated incident of aggravated sexual harassment, (2) forwarding to the Secretary of Defense the proposal to create the specific UCMJ sexual harassment crime, (3) the accomplishment of mandatory training for over 1 million naval servicemembers (active and reserve) on core values, including prevention of sexual harassment, (4) establishment of a Standing Committee on Military and Civilian Women in the Department of the Navy to enhance the roles of women, (5) approval of 80 recommendations from that Committee, and (6) totally revamping the criminal and administrative investigatory arms of the Navy in response to the perceived failures of the Tailhook investigation. Memorandum from Barbara S. Pope, Assistant Secretary of the Navy (Manpower and Reserve Affairs) to Assistant Secretary of Defense (Force Management and Personnel) (Nov. 25, 1992) (on file with author).

66. As examples of the media coverage of this incident see Navy Cadet Quits Over Prank Probe, Chi. Trib., May 14, 1990, at C9;

Molly Moore, Navy, Congress Open Probes of Harassment at Annapolis, Wash. Post, May 18, 1990, at A1.

67. See e.g. Molly Moore, Navy Failed To Prosecute in 6 Rape Cases; Probe Finds Laxity on Sex Offenses at Florida Base, Wash. Post, Oct. 22, 1990, at A1.

68. See e.g. Women in Army Face 50% Higher Chance of Rape, Atl. Journ. & Const., Dec. 30, 1992, at A3.

69. See e.g. Air Force Suspends Use of Sex-Assault Checklist, Wash. Times, Sept. 23, 1992, at A2; Why Women Need Power, Atl. Journ. & Const., Sept. 26, 1992, at A12.

70. Office of Inspector General, DOD, Tailhook 91; Part 1 - Review of the Navy Investigations 1-2 (Sept. 1992) [hereinafter DOD IG Report]. At least as far back as the 1985 convention, the drunkenness and "lurid sexual acts" occurring at the conventions were known to high ranking Navy officials. In fact, the reputation of the conventions must have been considerable because the President of the Tailhook Association, in preparation for Tailhook 91, sent letters to various aviation community officers decrying damage done in the past to the hotel facilities, underage drinking, and problems with late night "gang mentality." Id. at Encl. 2.

71. Id. at 3-5, 31.

72. LT Coughlin is herself an aviator, and at the time of Tailhook 91, she was an aide to an admiral who was attending the Convention. See H. G. Reza, Woman Officer in Tailhook Incident Files Suit, L.A. Times, Jan. 22, 1993, at B8.

73. DOD IG Report, supra, note 70, at 4. Apparently the gauntlet was a tradition at past conventions, and it formed rather spontaneously throughout the convention whenever the necessary components of the gauntlet (females unexpectedly coming into the vicinity of drunken aviators in hotel passageways) presented themselves.

74. Id. During the course of the extensive Tailhook investigations, 25 victims of the gauntlet (including both naval officers and civilians) have been identified. Id. at Encl. (8), para. 4.

75. Id. at 4.

76. Id. at 26, 30-31.

77. Reza, supra note 72.

78. The DOD IG Report, which examined the Navy's internal investigations of Tailhook and was released in September 1992, severely criticized the Undersecretary of the Navy, the Judge Advocate General of the Navy [hereinafter Navy JAG], the Commander, Naval Investigative Service [hereinfter NIS], and the

Navy Inspector General. DOD IG Report, supra, note 70, at 31-32. Subsequently, the Acting Secretary of the Navy obtained the resignation of the Commander, NIS and reassigned the admiral who had been the Inspector General. Melissa Healy, No Further Punishment for Two Admirals, L.A. Times, Oct. 27, 1992, at A13. Although the Acting Secretary of the Navy publicly stated that the Navy JAG was resigning because of the Tailhook situation, the Navy JAG had announced plans to retire prior to the issuance of the report which was critical of him. J. Robert Lunney, Interview With RADM John E. Gordon, Immediate Past Judge Advocate General of the Navy, Nav. Res. Ass. News, Jan. 1993, at 7, 10. Even before the issuance of the Navy IG Report, Secretary of the Navy Garrett (who was present at Tailhook 91) had resigned on June 26, 1992, under pressure from the scandal. Eric Schmitt, Friends See Secretary as Honorable But ill-Served, N.Y. Times, June 27, 1992, at I7.

79. Enclosure (1) is the definition of sexual harassment issued in the SECDEF Memo of 20 July 88. See supra note 25 and accompanying text. This is an expansion of the EEOC definition because it extends the hostile environment type of sexual harassment beyond the traditional work environment.

80. Regulation, para. 8b.

81. Regulation, Encl. (2), para. 13.

82. Regulation, Encl. (2), para. 6.

83. Regulation, para. 8.

84. See infra pp. 57, 66-68.

85. A difficult issue for the fact-finder in hostile environment sexual harassment prosecutions under the Regulation will be whether the offensive conduct is "sexual" in nature. The Regulation definition of "sexual nature" states that the behavior need not necessarily be "overtly" sexual if it creates a hostile environment. Regulation, Encl. (2), para.11. This circular reasoning is sure to generate much litigation.

86. Regulation, Encl. (2), para. 12.

87. Regulation, Encl. (2), para. 6.

88. Id.

89. In Vinson the Supreme Court held that evidence of a recipient's sexually provocative dress or speech is relevant to whether the conduct is unwelcome. 477 U.S. at 69.

90. In United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990), a convening authority attempted to prosecute a soldier for sexual harassment by incorporating the nonpunitive provisions against sexual harassment contained in the Army equal opportunity regulation into the punitive Army standards of conduct

regulation. The Army Court of Military Review rejected this incorporation for various reasons, including that a prosecution for the equal opportunity version of sexual harassment permits conviction "on mere proof that a victim subjectively found an accused's conduct offensive . . ." Id. at 923. This case supports the view that the similar standard of criminality contained in the Regulation, being that it is tied to the subjective perceptions of the victims, is offensive to principles of military law.

91. See Ellison v. Brady, 924 F.2d 872, 879-80 (9th Cir. 1990); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987).

92. See infra pp. 31-37.

93. It seems that even where the drafters say the conduct is always criminal, it would be easy to imagine situations where the conduct does not even rise to the level of the Regulation's standard for hostile environment. For instance, a calendar in an all male working area aboard a ship at sea probably would not create a hostile environment, although this may be an instance where the insensitive sensibilities of the sailors fail the "reasonable person standard." See supra p. 27.

94. Interestingly, the drafters write that "the most severe forms of sexual harassment constitute criminal conduct, e.g.

sexual assault" Regulation, Encl. (3), para. 5c. While that is true, because of this Regulation all the less severe forms of conduct also become criminal.

95. Regulation, Encl. (3), Note (emphasis in original).

96. United States v. Harriss, 347 U.S. 612, 617 (1954).

Similarly, in Connally v. General Construction Co., 269 U.S. 385, 391 (1926), the Court stated "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

97. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

98. 408 U.S. 104, 108-09 (1972) (footnotes omitted).

99. Village of Hoffman Est. v. Flipside, Hoffman Est., 455 U.S. 489, 499 (1982); Smith v. Goguen, 415 U.S. 566, 573 (1974).

100. Rose v. Locke, 423 U.S. 48, 50 (1975).

101. Id. at 50 n.3.

102. The Supreme Court has recognized that a scienter requirement may mitigate the vagueness of a law. Village of Hoffman, 455 U.S. at 499; Colautti v. Franklin, 439 U.S. 379, 395 (1979). This principle has also been recognized by military

courts. *United States v. Bradley*, 15 M.J. 843, 844 (A.F.C.M.R. 1983); *United States v. Cannon*, 13 M.J. 777, 778 (A.C.M.R.), pet. denied, 14 M.J. 226 (C.M.A. 1982). Since there is basically no intent element for the hostile environment aspect of the Regulation, the issue of a scienter limitation has no effect on the Regulation's constitutionality. As mentioned supra p. 29, the Encl. (1) definition does have a provision that deliberate unwelcome conduct is sexual harassment. While deliberate conduct can obviously be sexual harassment, the harassing conduct need not be deliberate to satisfy the Regulation definition for hostile environment sexual harassment. Thus, the Regulation has no mandatory intent requirement.

103. *United States v. Scoby*, 5 M.J. 160 (C.M.A. 1978); *United States v. Reed*, 24 M.J. 80, 83 (C.M.A. 1987) (Everett, C.J., concurring).

104. *United States v. Mabezza*, 3 M.J. 973, 975 (A.F.C.M.R. 1977).

105. Mabezza, 3 M.J. 973 ("show and tell" regulation prohibiting black marketing not vague); Cannon, 13 M.J. 777; Bradley, 15 M.J. 843 (regulations prohibiting possession of drug paraphanalia not vague when scienter element inferred); *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981), pet. denied, 13 M.J. 31 (C.M.A. 1982) (regulation prohibiting social fraternization at training post withstands vagueness challenge); Reed, 24 M.J. 80

(prosecution of failure to report to proper authority known offenses of others as violation of Navy Regulation 1139 runs afoul of the vagueness doctrine).

106. 417 U.S. 733 (1974).

107. Id. at 743.

108. Id. at 750.

109. Id. at 756. The standard for "criminal statutes regulating economic affairs" is explicitly described in *Village of Hoffman Est. v. Flipside*, Hoffman Est., 455 U.S. 489, 497 (1979), where the Court said that the "complainant must demonstrate that the law is impermissibly vague in all its application."

110. See supra note 23 and accompanying text.

111. Parker, 417 U.S. at 751-54.

112. 20 M.J. 155, 158 (C.M.A. 1985), cert. denied, 474 U.S. 850 (1985).

113. See e.g. Village of Hoffman Est., 455 U.S. at 494-95; Parker, 417 U.S. at 756-57; *United States v. McGuinness*, 35 M.J. 149, 152 (C.M.A. 1992), cert. denied, 1993 U.S. LEXIS 1691 (1993).

114. McGuinness, 35 M.J. at 152.

115. 33 M.J. 295 (C.M.A. 1991), cert. denied, 112 S. Ct. 1173 (1992).

116. Id. at 299.

117. UCMJ Articles 133 and 134 have generally withstood vagueness challenges because they are tied into an already constitutionally approved standard of conduct which is service discrediting or prejudicial to good order and discipline. The Regulation, however, is not tied to such a constitutionally approved standard.

118. Regulation, Encl. (3), para. 2 provides background information about the Navy sexual harassment policy, including that the definition derives from Title VII law. From this discussion it can be argued that the drafters intended to incorporate employment discrimination concepts into the regulatory offense.

119. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).

120. Encl. (2), para. 9 contains a definition of "severe or pervasive," but these terms are not otherwise used in Encl. (1), or anywhere else in the Regulation.

121. Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Burns v. MacGregor Electronics Ind., Inc., 955 F.2d 559 (8th Cir. 1992); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

122. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

123. No. 92-1168, 1993 U.S. Lexis 1937 (Mar. 1, 1993).

124. The uncertainty in the standard for employment hostile environment cases is illustrated by comparing the results of two similar cases arising in different circuits. In *Rabidue*, 805 F.2d 611, the Sixth Circuit held that posting of nude and partially nude photographs of women in work spaces by male employees did not constitute hostile environment sexual harassment because they had only a "de minimus effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica" *Id.* at 622. The same type of photo displays were deemed to create a hostile environment in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

The uncertainty in the law is so pronounced that even an organization like the American Civil Liberties Union [hereinafter ACLU] is divided and confused. Reacting to the *Robinson* decision, the Florida chapter of the ACLU decried the decision as an infringement of First Amendment rights, but the national ACLU organization supported the decision. See Clarence Page, Pinups

Today, Press Tomorrow, It's Not a Pretty Picture, Chi. Trib., Nov., 6, 1991, at C19; Larry Witham, Pinup Ruling Splits ACLU, Wash. Times, Nov., 2, 1991, at A1.

125. The last sentence in the enclosure (1) definition of sexual harassment states that "unwelcome verbal comments . . . of a sexual nature" constitute sexual harassment. In the enclosure (2), para. 11' definition of "sexual nature," "sexist remarks or slurs" are prohibited.

126. Marcy Strauss, Sexist Speech in the Workplace, 25 Harv. C.R.-C.L.L. Rev. 1 (1990); Kingsley R. Browne, Title VII as Censorship: Hostile-Environment and the First Amendment, 52 Ohio St. L.J. 481 (1991). It should be noted that Professor Browne begins his article with an example similar to the one I have used to introduce the speech issue.

127. Strauss, supra note 126, at 4-5, 21. In particular, Strauss concludes that the government's interest in precluding workplace sexist speech outweighs free speech concerns when the offensive speech is aimed at a captive audience or causes discrimination against women. Free speech prevails when the comments are not directed at a particular woman and the statement is not discriminatory. Id. The types of speech that generally fall into the category where the balance is always struck for regulation are "(1) sexual demands or requests; (2) sexually explicit speech directed at the woman employee; [and] (3)

degrading speech directed at the employee." Id. at 43. The category where speech rights may prevail is for "sexually explicit or degrading speech or expression that is not directed at the woman, but which she overhears or sees." Id. Thus, the sexist JAG statement would likely be protected speech even under the balancing approach urged by Professor Strauss.

128. Browne, supra note 126, at 540-43.

129. Supra note 126, Stauss at 21; Browne at 531.

130. United States v. Priest, 45 C.M.R. 338 (C.M.A. 1972);
United States v. Ezell, 6 M.J. 307, 313 (C.M.A. 1979).

131. Miller v. California, 413 U.S. 15 (1973).

132. Beauharnais v. Illinois, 343 U.S. 250 (1952).

133. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

134. Stromberg v. California, 283 U.S. 359 (1931).

135. Abrams v. United States, 250 U.S. 616 (1919).

136. United States v. Grace, 461 U.S. 171, 177 (1983).

137. 45 C.M.R. 338 (C.M.A. 1972).

138. Id. at 344. The Priest Court quoted the following famous

words of Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919):

The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

139. Priest, 45 C.M.R. at 344 (internal citations omitted).

140. 417 U.S. at 758-59.

141. 417 U.S. at 759-61.

142. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

143. *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965).

144. *United States v. Scoby*, 5 M.J. 160, 162 (C.M.A. 1978); *United States v. Orben*, 28 M.J. 172 (C.M.A.), cert. denied, 493 U.S. 854 (1989); *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986).

145. *United States v. Reed*, 24 M.J. 80, 82 (C.M.A. 1987) (First Amendment issue not reached, but likely would have been disposed of by Parker); *United States v. Womack*, 29 M.J. 88, 91 (C.M.A. 1989) ("safe sex" order not unconstitutional due to the different application of First Amendment in military, citing Parker);

United States v. Sartin, 24 M.J. 873, 874 (A.C.M.R. 1987), pet.
denied, 26 M.J. 60 (C.M.A. 1988), (anti-fraternization order
limiting right to associate is not First Amendment violation,
citing Parker).

146. The only military justice case that discusses overbreadth
is United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981), pet.
denied, 13 M.J. 31 (C.M.A. 1982). Citing merely to Parker and
the need for internal military discipline, the Army Court of
Military Review rejected the overbreadth claim of a soldier who
himself was not subject to a constitutional violation. In United
States v. Adams, 19 M.J. 996, 998 (A.C.M.R. 1985), an overbreadth
challenge was summarily rejected. If overbreadth is deemed
appropriate to the analysis, the Regulation would likely have to
be struck in toto.

147. Browne, supra note 126, at 501-10.

148. Id. at 502-03. Professor Browne points to Rabidue v.
Osceola Refining Co., 805 F.2d 611, 624 (6th Cir. 1986), cert.
denied, 481 U.S. 1041 (1987), as illustrative of his point.
There, distinguished jurists disagreed over whether a plaque
resting on a supervisor's desk which stated "[e]ven male
chauvinist pigs need love" could create the hostile environment.
Professor Browne asserts that if the judiciary is so uncertain,
the citizenry certainly cannot know what they are permitted do
say or do. Furthermore, he claims the standard is so vague that

different factfinders will almost always be able to find that the same conduct did or did not constitute harassment, and only in the most extreme cases would they be wrong as a matter of law.

149. Id. at 504-10.

150. See infra pp. 47-51.

151. 112 S. Ct. 2538 (1992).

152. Id. at 2547-48.

153. Id. at 2547.

154. Id. at 2557.

155. Id.

156. Id. at 2546.

157. Id. at 2557-58.

158. 35 M.J. 682 (A.C.M.R. 1992), pet. filed, No 93-0131/AR (C.M.A. 5 Nov. 1992).

159. Id. at 685.

160. Regulation, Encl. (1).

161. Since the fact of sexual harassment is a predicate for this offense, the difficulties in determining what constitutes sexual harassment (especially in "yellow zone" conduct) are equally in

existence for the respondeat superior crime. Thus, all vagueness and First Amendment issues discussed supra, are equally relevant here.

162. Examples may serve to illustrate the problem. Does a supervisor who overhears a sexually explicit joke told in the office environment know or have reason to know that sexual harassment has occurred? Arguably, if personnel who find the remark "unwelcome" are present, then yes. What if no one comes forward and complains, must he make inquiries with those he feels might be offended? Does the second line supervisor have a duty to discover this upon report from the first line supervisor? The commanding officer? As another example, an anonymous hot-line complaint alleges sexual harassment in a unit. Does the commanding officer have "reason to have knowledge?" The difficulties in this provision are enormous.

163. Manual For Courts-Martial, United States, pt.IV, (1984) [hereinafter MCM] para. 16b(3)(b).

164. Id. at para. 16c(3)(b).

165. See supra p. 44.

166. UCMJ, Article 77 makes a party a principal to a crime if he "aids, abets, counsels, commands, or procures" the commission of the underlying crime. But for this theory of criminal liability, the party must generally act in some way to further the crime and

share in the criminal purpose of design. MCM, pt. IV, para. 1b(2)(b). This same paragraph states that "[i]n some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example a guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime if such a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator." (emphasis in original). This concept may marginally help to define the concept of ignoring, but does nothing to help define what condones means.

167. It seems likely that in many cases the supervisor who condones or ignores the sexual harassment might also be a perpetrator of the underlying sexual harassment. In such cases, it is unlikely that he could be prosecuted for the respondeat superior offense because his own failure to combat the sexual harassment would likely lead to self-incrimination, thereby invoking the "Heyward doctrine." United States v. Heyward, 22 M.J. 35 (C.M.A. 1986); United States v. Thompson, 22 M.J. 40 (C.M.A. 1986); United States v. DuPree, 24 M.J. 319 (C.M.A. 1987).

168. Regulation, Encl. (2), para. 8.

169. The only UCMJ provision remotely dealing with reprisals is the Article 134 prohibition against obstructing justice. MCM,

pt. IV, para. 96. This crime requires that there be a criminal proceeding that the accused attempted to influence, impede, or otherwise obstruct. A criminal proceeding is interpreted broadly, and charges need not even formally be brought. United States v. Jones, 20 M.J. 38, 40 (C.M.A. 1985). Still, there must at least be a criminal investigation and there must be a corruption of the due processes of justice, not a mere frustration of justice in the abstract sense. United States v. Turner, 33 M.J. 40, 42 (C.M.A. 1991); United States v. Guerrero, 28 M.J. 223, 227 (C.M.A. 1989). Thus, the mere infliction of a reprisal not geared at impeding an investigation or proceeding would not be within the scope of obstructing justice.

170. Regulation, Encl. (2), para. 8.

171. MCM, pt. IV, para. 16e(1).

172. MCM., pt. IV, para. 16e, Note. This policy is commonly referred to as the "footnote 5" doctrine because it derived from a footnote attached to the Table of Maximum Punishments in earlier editions of the MCM.

173. United States v. Quarles, 1 M.J. 231, 232-33 (C.M.A. 1975) (emphasis in original).

174. For instance, disrespect to a superior commissioned officer under Article 89 has a confinement limit of one year, disrespect towards warrant and noncommissioned officers under Article 91

ranges from 3 to 9 months confinement, cruelty and maltreatment under Article 93 has a one year confinement limit, provoking speech and gestures under Article 117 is 6 months, simple assault and assault consummated by battery under Article 128 are 3 and 6 months, respectively, the base punishment for conduct unbecoming under Article 133 is one year, and indecent exposure and indecent language under Article 134 both have 6 months confinement caps. For some of these offenses (simple assault, disrespect to noncommissioned officers not in the execution of office, and provoking speech and gestures) no punitive discharge is authorized. MCM App. 12 (Maximum Punishment Chart).

Another related point should be mentioned that will limit the use of the Regulation for punishment enhancement. In United States v. Curry, 28 M.J. 419 (C.M.A. 1989), it was held that sexual harassment type conduct that was maltreatment under Article 93 preempted prosecution of the same conduct as a violation of an order under Article 92. In Curry, COMA seemed to confuse the preemption doctrine, which is relevant to prosecutions involving Article 134 that could have been charged as other established Code provisions, with the "footnote 5" doctrine. See MCM pt. IV, para. 60c(5)(a) and United States v. McGuinness, 35 M.J. 149 (C.M.A. 1992) for discussions of the applicability of preemption. COMA remanded the case and the Navy Court thereafter determined that there was insufficient evidence to sustain the maltreatment charges. United States v. Curry, No. 88-0719R (N.M.C.M.R. 31 July 1991). The case was appealed to

COMA again, and the Court determined that an affirmed bribery charge did not preempt a standards of conduct orders violation. 35 M.J. 359 (C.M.A. 1992). Although confusing, the two Curry decisions by COMA lend vitality to the argument that the maximum punishment for Article 93, or other articles of the Code, will serve as the outer limit of punishment when those articles could have been utilized to prosecute the sexual harassment offense charged under the Regulation. The Curry preemption doctrine reasoning was also utilized in United States v. Asfeld, 30 M.J. 917, 923 (A.C.M.R. 1990), when the Army Court of Military Review noted in dicta that a punitive sexual harassment regulation would be preempted by Article 93.

175. This exception was first applied in United States v. Buckmiller, 4 C.M.R. 96 (C.M.A. 1952), and has been subsequently reiterated. United States v. Loos, 16 C.M.R. 52 (C.M.A. 1954); United States v. Timmons, 13 M.J. 431 (C.M.A. 1982).

176. This argument is strongest when the hostile environment crime will be created by cumulative, on-going events, none of which in themselves are violations. This, of course, is where the Regulation is most subject to vagueness challenges.

177. Furthermore, the thrust of the law seems to be for a more expansive application of the footnote 5 doctrine. See United States v. Ame, 35 M.J. 592 (N.M.C.M.R. 1992) (doctrine applies to charges under Article 92(3), as well as Articles 92(1) and (2)).

178. Regulation, para 8b(3).

179. MCM, pt. IV, para. 31.

180. This Article states "[a]ny person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct."

181. United States v. Dickey, 20 C.M.R. 486, 488 (N.B.R. 1956), United States v. Finch, 22 C.M.R. 698, 701 (N.B.R. 1956). There was no similar provision in the Articles of War. Id. A review of the legislative history contained in the Index and Legislative History to the Uniform Code of Military Justice, 1950 (1985) shows that there was absolutely no discussion concerning this Article when the Code was enacted.

182. Dickey, 20 C.M.R. at 488.

183. 22 C.M.R. at 701.

184. Id.

185. MCM, pt. IV, para. 17c(2).

186. Dickey, 20 C.M.R. at 488; MCM, pt. IV, para. 17c(1).

187. MCM, App. 21, para. 17.

188. 28 M.J. 419 (C.M.A. 1989). Curry was discussed supra note

174 with respect to whether the preemption doctrine would affect the Navy Regulation. The paucity of caselaw regarding this crime undoubtedly reflects the social issues surrounding sexual harassment. While military courts may not have dealt extensively with this issue in a direct fashion in the past, it is obvious that they will be required to address the issue in the future.

189. 30 M.J. 1198 (A.F.C.M.R. 1990), aff'd, 32 M.J. 309 (C.M.A. 1991) (summary disposition).

190. For instance, in the presence of male and female subordinates he would make remarks such as "I have a big one for you," "blow me," "suck my dick," and "get under my desk," while frequently clutching at his groin area. 30 M.J. at 1200.

191. Id.

192. Id. at 1201.

193. Id.

194. See supra p. 5. Even though the Manual discussion of maltreatment contains some of the sexual harassment concepts that exist in employment discrimination law, the thrust of the legal analysis in Hanson uses traditional military criminal law concepts that can be analogized to employment discrimination sexual harassment. The term "sexual harassment" is not used in the Hanson decision. In fact, it appears that Hanson was

convicted of conduct unbecoming an officer in violation of Article 133, rather than maltreatment in violation of Article 93. 30 M.J. at 1202. Such an approach to prosecuting sexual harassment under the various Code provisions will avoid many of the ambiguity problems that burden Title VII law and its adaptation into the Navy Regulation.

It is interesting to contrast the actionable maltreatment in Hanson with the much older case of United States v. Wheatley, 28 C.M.R. 461 (A.B.R.), aff'd, 28 C.M.R. 103 (C.M.A. 1959), where a maltreatment conviction for a company commander was reversed. In the presence of the accused (the commander), a trainee being "oriented" by a master sergeant was to "sound off" certain obscenities whenever the sergeant gave him a particular cue. The Government argued that the sergeant's activity constituted mental maltreatment, and the commander's failure to intervene and his acquiescence in the conduct made him an aider and abettor. The Army Board of Review, focussing on the fact that the "victim" who was most affected by the activity considered it a "joke," decided not to punish the commander "because he ignores and fails to censor the horseplay and language of his enlisted subordinates whenever it exceeds the bounds of good taste." 28 C.M.R. at 463-64. While this case may only indicate that sexual harassment in today's environment is much more cruel or offensive, it does highlight that the "victim's" perceptions are a key factor, and that the question of a supervisor's liability for the known misconduct of a subordinate is a difficult issue.

195. 22 M.J. 819, 823 (N.M.C.M.R. 1986).

196. See supra pp. 23-31.

197. See supra pp. 16-17.

198. MCM, pt. IV, para. 17e. The maximum punishment does include a dishonorable discharge.

199. UCMJ, art. 56.

200. A direct comparison of the Regulation hostile environment with the provision in Article 93 is illuminating. The Code sexual harassment as interpreted by Hanson, 30 M.J. at 1201, has a standard that is clearly objective with the victim's reaction merely an important factor in determining whether "the deliberate or repeated offensive commands or gestures of a sexual nature" constitute the sexual harassment version of maltreatment. MCM, pt. IV, para. 17c(2). It does not include the "unwelcome" concept of the Regulation, which throws confusion into whether the standard is objective or subjective. Also, as interpreted in Hanson, 30 M.J. at 1201, the severe and pervasive requirement exists for maltreatment sexual harassment, a requirement which has apparently been abandoned in the Regulation. It is suggested that the Code sexual harassment is far clearer and fairer than the provisions of the Regulation.

201. 35 M.J. 432 (C.M.A. 1992).

202. Id. at 433-34.

203. Id. at 436.

204. 28 M.J. 197 (C.M.A. 1989).

205. The same fact pattern occurred in *United States v. Hicks*, 24 M.J. 3 (C.M.A.), cert. denied, 484 U.S. 827 (1987). The accused, a male Marine sergeant, discovered a 20 year old girlfriend of a private (who worked under the sergeant's supervision) unlawfully in the barracks. The accused told the private that he should have the girl go to the accused's room while the private was at work so that the private's misconduct would not be discovered. Once in the accused's room, he coerced her to have intercourse with him to prevent the private from getting in trouble.

206. 34 M.J. 33 (C.M.A. 1992).

207. 33 M.J. 1075 (A.C.M.R. 1992).

208. 25 M.J. 711 (A.C.M.R. 1987).

209. MCM, pt. IV, para. 45e. However, there is serious doubt about the constitutionality of capital punishment for rape of an adult. See Coker v. Georgia, 433 U.S. 584 (1977). Even assuming the death penalty is unconstitutional for rape, confinement up to life imprisonment provides a strong avenue of retribution.

210. Art. 128 (simple assault) 3 months confinement; (assault consummated by battery) 6 months confinement. MCM, pt. IV, para. 54e; Art. 134 (indecent assault) 5 years confinement. MCM, pt. IV, para. 63e, (assault with attempt to commit rape) 20 years confinement. MCM, pt. IV, para. 64e.

211. MCM, pt. IV, para. 83.

212. See generally David S. Jonas, Fraternization: Time for a Rational Department of Defense Standard, 135 Mil. L. Rev. 37 (1992).

213. See e.g. United States v. Wales, 31 M.J. 301 (C.M.A. 1990); United States v. Appel, 31 M.J. 314 (C.M.A. 1990) (sex between commanding officer and subordinate enlisted is violation of Air Force custom); United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986), aff'd, 24 M.J. 347 (C.M.A. 1987) (summary disposition); United States v. Moultsak, 21 M.J. 822, 831-34 (N.M.C.M.R. 1985), aff'd, 24 M.J. 316 (C.M.A. 1987).

Fraternization can also serve as a basis for conviction of conduct unbecoming an officer under Article 133. United States v. Perrillo, 34 M.J. 112, 120 (C.M.A. 1992); United States v. Van Steenwyk, 21 M.J. 795, 805 (N.M.C.M.R. 1985).

214. Fraternization between senior enlisted and their

subordinates is also subject to prosecution if the relationship is service discrediting or prejudicial to discipline. United States v. Carter, 23 M.J. 683 (N.M.C.M.R. 1986); United States v. March, 32 M.J. 740 (A.F.C.M.R. 1991); United States v. Clarke, 25 M.J. 631 (A.C.M.R. 1987), aff'd, 27 M.J. 361 (C.M.A. 1989). Likewise, dating and sexual relations between senior officers with junior officers under their command or supervision is subject to the fraternization prohibition. United States v. Callaway, 21 M.J. 770 (A.C.M.R. 1986).

215. 12 M.J. 679 (A.C.M.R. 1981), pet. denied, 13 M.J. 207 (C.M.A. 1982).

216. 34 M.J. 628 (A.F.C.M.R. 1992).

217. Id. at 635.

218. Until recently each service had a punitive standards of conduct regulation. See Dep't of Army, Reg. 600-50, Standards of Conduct for the Department of Army Personnel, (28 Jan. 1988), Dep't. of Air Force, Air Force Reg. 30-30, Standards of Conduct (26 May 1989), and Dep't of Navy, Secretary of the Navy Instr. 5370.2J (15 Mar. 1989). These regulations, however, are now obsolete because as of February 3, 1993 the entire federal executive branch, including the armed forces, is being regulated by a single regulation. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635 (1992).

This regulation has the same prohibition against using one's official position for personal advantage as did the service regulations. 5 C.F.R. § 2635.702. The DOD plans to supplement these rules with a punitive regulation.

219. See e.g. United States v. Sartin, 24 M.J. 873 (A.C.M.R. 1987), pet. denied, 26 M.J. 60 (C.M.A. 1988); United States v. Moorer, 15 M.J. 520 (A.C.M.R. 1983), aff'd in pertinent part, 16 M.J. 451 (C.M.A. 1983)(summary disposition).

220. United States v. Lowery, 21 M.J. 998, 1001 n.3 (A.C.M.R. 1986), aff'd, 24 M.J. 347 (C.M.A. 1987)(summary disposition).

221. 24 M.J. 3 (C.M.A. 1987), cert. denied, 484 U.S. 827 (1987).

222. See MCM, pt. IV, para. 66; Moorer, 15 M.J. at 521.

223. MCM, pt. IV, paras. 13 and 15. Both of these provisions have technical requirements that may limit their viability as a means of prosecuting offensive gestures and remarks in the workplace environment. Most fundamentally, they do not apply unless the words or conduct are directed towards a superior, and with respect to warrant, noncommissioned, and petty officers, the victims must be in execution of their duties when the offending behavior occurs. MCM, pt. IV, para. 15b(3)(e).

224. 16 M.J. 642 (A.F.C.M.R. 1983).

225. Id. at 643.

226. See supra pp. 16-17.

227. MCM, pt. IV, para. 42c(1).

228. In *United States v. Linyear*, 3 M.J. 1027 (N.C.M.R. 1977), pet. denied, 5 M.J. 269 (C.M.A. 1978), a male sailor called a female sailor a "swine" and walked away from her. The Court held that such language was sufficient to state an offence under Article 117. •

229. *United States v. Davis*, 34 M.J. 849, 851 (A.C.M.R. 1992).

230. MCM, pt. IV, para. 89c explains that "indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature or its tendency to incite lustful thoughts."

231. 31 M.J. 57 (C.M.A. 1990).

232. 31 M.J. at 60 (internal citations omitted).

233. Id.

234. *United States v. Dudding*, 34 M.J. 975 (A.C.M.R. 1992).

235. Such a term does not invite libidinous thoughts. *United States v. Linyear*, 3 M.J. 1027, 1030 (N.C.M.R. 1977), pet. denied, 5 M.J. 269 (C.M.A. 1978).

236. United States v. Wainwright, 42 C.M.R. 997, 999 (A.F.C.M.R.), aff'd on other grounds, 43 C.M.R. 23 (C.M.A. 1970).

237. Indecent language is equivalent to "obscene" language. MCM, App. 21, para. 102. Judge Cox in French relied upon the Supreme Court's reasoning in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) and Roth v. United States, 354 U.S. 476 (1957), to help determine what is obscene in a constantly changing society. 31 M.J. at 59.

238. MCM, pt. IV, para. 90. The wrongful act must be committed with another and it must be indecent, which is defined as those forms "of immorality relating to sexual impurity which [are] not only grossly vulgar, obscene, and repugnant to common propriety, but tend to excite lust and deprave the morals with respect to sexual relations." Id. at para. 90c.

239. United States v. Blake, 33 M.J. 923 (A.C.M.R. 1991); United States v. Linnear, 16 M.J. 628 (A.F.C.M.R. 1983), pet. denied, 17 M.J. 277 (C.M.A. 1983). Fellatio could also be charged as a violation of Article 125. See United States v. Henderson, 34 M.J. 174 (C.M.A. 1992)

240. United States v. Whitcomb, 34 M.J. 984 (A.C.M.R. 1992).

241. United States v. Holland, 31 C.M.R. 30 (C.M.A. 1961).

242. United States v. Thomas, 25 M.J. 75 (C.M.A. 1987).

243. United States v. Woodard, 23 M.J. 514 (A.F.C.M.R. 1986),
vacated on other grounds, 23 M.J. 400 (C.M.A. 1987).

244. See MCM, pt. IV, para. 88 (indecent exposure); United States v. Choate, 32 M.J. 423 (C.M.A. 1991).

245. United States v. Guerrero, 33 M.J. 295, 297 (C.M.A. 1991),
cert. denied, 112 S.Ct. 1173 (1992) (quoting United States v. Davis, 26 M.J. 445, 448 (C.M.A. 1988)).

246. 33 M.J. 295 (C.M.A. 1991).

247. Article 92(3) makes criminal not only intentional, but also negligent dereliction of duty. In light of the "zero tolerance" policy on sexual harassment that has been extensively publicized and implemented throughout the military via regulation, commanders and supervisors who are aware of, or should be aware of, sexual harassment in their units likely are subject to sanctions under a dereliction of duty theory. The main requirement for liability under this theory is knowledge of a duty. MCM pt. IV, para. 16b(3)(b). While at this time it is unclear exactly the scope of the duty that superiors must obey, prosecutions using dereliction of duty as a theory for the respondeat superior crime will at least be aligned with a traditional concept in military criminal law. The criminal standard will be much more certain than that of the Regulation, which is keyed to the superior's knowledge of a subordinate's

harassment, rather than an affirmative duty. The ambiguity about what conduct constitutes hostile environment sexual harassment is lessened. Under Article 92(3) there will likely be little difficulty in finding a superior responsible when the underlying sexual harassment is severe and pervasive. At the same time, using the statute should protect against unwarranted prosecutions when the acts of the subordinate are more marginal. This is a fairer and more workable way to deal with the vicarious liability issue.

248. Memorandum from H. Lawrence Garrett III, Secretary of the Navy to the Judge Advocate General of the Navy (June 12, 1992) (on file with author).

249. Id.

250. See H.R. Rep. No. 491, 81st Cong., 1st Sess 39 (1949), reprinted in Index and Legislative History, Uniform Code of Military Justice, 1950 (1985).

251. Of course, the continued prosecution of the underlying conduct under standard Code provisions, without resort to individual service-specific punitive regulations, provides the same uniformity.

252. The proposal is designated as UCMJ, Article 93a.

253. The educational, managerial, and administrative components

of the Regulation are indeed necessary elements in an aggressive military campaign to eradicate sexual harassment. It is merely the overreaching punitive aspects of the Regulation that are problematic. Interestingly, the mandatory processing for administrative separation provision contained in the Regulation is more moderate than the punitive measures. The Regulation mandates processing for quid pro quo and assaultive sexual harassment. Regulation, para. 8e. Thus, while a person could be court-martialed and suffer the Article 92(2) maximum punishment for hostile environment sexual harassment conduct, that conduct likely would not trigger the mandatory administrative processing requirement contained in the Regulation.

254. The legislative proposal answers many of the questions that the Regulation simply ignores. This was accomplished by drafting the proposed MCM paragraph containing the elements of the crimes, explanation, lesser included offenses, maximum punishments, and sample specifications.

255. Proposed Article 93a(a)(1). The Regulation quid pro quo crime is blurred throughout the Encl. (1) definition.

256. Proposed Article 93a(b)(first sentence).

257. Proposed MCM, pt. IV, para. 18c(2)(c).

258. Id. at paras. 18c(2)(b)(ii) and (c)(ii).

259. Proposed MCM, pt. IV, paras. 18c(2)(a)(i) and (b)(i).

260. Proposed MCM, pt. IV, para. 18c(2)(b)(ii).

261. Proposed Article 93a(a)(2).

262. 391 U.S. 367 (1968). Under O'Brien, if the restriction is within the powers of the government and aims primarily at conduct with only an incidental restraint on speech, it can be upheld if there is a substantial government interest, the interest is unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedoms is carefully tailored. Id. at 377.

263. Proposed MCM, pt. IV, para. 18c(2)(a)(i).

264. See supra note 148 and accompanying text.

265. See supra note 149 and accompanying text.

266. Proposed MCM, pt. IV, para. 18b(3).

267. The statute is still subject to the "underinclusiveness" free speech challenge flowing from R.N.V. v. St Paul, 112 S. Ct. 2538 (1992). See supra pp. 44-45.

268. Proposed Article 93a(c) is a limited preemption doctrine that will further the goal of consolidating prosecutions for workplace sexual harassment in one standard provision. This section also clarifies the distinction between more serious and

violent sex crimes like rape, and milder, but still criminal, workplace harassment. On the negative side, the statute does not contain any provision prohibiting reprisals like the Regulation contains. In light of the absence of other Code protections for sexual harassment victims and whistleblowers, a narrowly drawn provision criminalizing reprisal actions would be an improvement to the statute.

269. The direct criminalization also prohibits quid pro quo conduct, but such conduct is already criminally forbidden.

270. In addition to the many problems with the Regulation discussed supra, command influence lurks as a potential problem area. There have been widespread policy pronouncements concerning not only the problem, but what must be done to perpetrators, especially in highly publicized cases such as Tailhook. Imaginative lawyers will undoubtedly discover many other problems with the Regulation.

271. One significant deficiency in current law is the lack of a direct prohibition against reprisals to sexual harassment whistleblowers. It is recommended that a provision like that contained in Regulation, para. 8b(2) (with the recommended addition of a scienter requirement, see supra p.52) be uniformly adopted for the services. This could be accomplished through issuance of a joint punitive regulation.

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, DC 20350-1000

SECNAVINST 5300.26B
ASN(M&RA)
6 January 1993

SECNAV INSTRUCTION 5300.26B

From: Secretary of the Navy
To: All Ships and Stations

**Subj: DEPARTMENT OF THE NAVY (DON)
POLICY ON SEXUAL HARASSMENT**

Ref: (a) SECDEF Memo of 20 July 88
(NOTAL)
(b) DODDir 1350.2 of 23 Dec 88
(NOTAL)
(c) DODDir 1440.1 of 21 May 87
(NOTAL)
(d) 29 C.F.R. § 1604.11 (NOTAL)
(e) Title VII of the Civil Rights Act
of 1964, as amended, 42 U.S.C.
2000e (NOTAL)
(f) U.S. Navy - Marine Corps
White Paper "...From the Sea,
Preparing the Naval Service for
the 21st Century" of September
1992 (NOTAL)

Encl: (1) Department of the Navy Definition
of Sexual Harassment
(2) Glossary of Terms
(3) Range of Behaviors Which
Constitute Sexual Harassment

1. Purpose. To provide a comprehensive
Department of the Navy (DON) policy for all
military and civilian personnel on the
identification, prevention, and elimination of
sexual harassment and to establish regulations to
enforce that policy.

2. Cancellation. SECNAVINST 5300.26A.

3. Applicability. This instruction applies to
all DON civilian personnel, including non-
appropriated fund employees; active-duty
military personnel, both Regular and Reserve;
midshipmen of the Naval Academy and in the
Reserve Officer Training Corps; and Reserve
personnel when performing active or inactive

duty for training, or engaging in any activity
directly related to the performance of a
Department of Defense (DOD) duty or function.

4. Summary of Changes. This instruction is a
complete revision and should be reviewed in its
entirety. Major changes are:

- a. Publishes the DON definition of sexual
harassment, enclosure (1), in accordance with
the DOD definition published in reference (a).
- b. Makes clear that the prohibition against
sexual harassment may be enforced through
punitive, disciplinary, or administrative action
(including punishment for violation of a lawful
general order under Article 92, Uniform Code of
Military Justice (UCMJ)) under military or
civilian systems.
- c. Prohibits reprisals against individuals who
provide information on incidents of sexual
harassment.
- d. Expands education and training
requirements.
- e. Mandates administrative separation
processing for military personnel for certain
substantiated sexual harassment offenses.
- f. Adds a requirement for an effective
system to resolve complaints of sexual
harassment.
- g. Adds a requirement of a DON
information system for tracking incidents of
sexual harassment.
- h. Adds a glossary of terms at enclosure
(2).
- i. Provides at enclosure (3), a non-technical
discussion of sexual harassment in "layperson"
terms for the purpose of providing background
information and describing behavior which may
constitute sexual harassment.

APPENDIX A



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5. Definition and Terms. Enclosure (1) defines sexual harassment in accordance with reference (a) through (c). This is the DOD definition which expands the Equal Employment Opportunity Commission's (EEOC) definition in reference (d). Interpretation of this instruction and enclosure (1) shall be governed by the definitions in enclosure (2).

6. Background

a. The Navy-Marine Corps Team must be comprised of an optimally integrated group of men and women who must be able to work together to accomplish the mission. Each member of the team is entitled to be treated fairly, with dignity and respect, and must be allowed to work in an environment free of unlawful discrimination.

b. The economic costs of sexual harassment are significant. Even more harmful, however, are the negative effects of sexual harassment on productivity and readiness, including increased absenteeism, greater personnel turnover, lower morale, decreased effectiveness, and a loss of personal, organizational, and public trust. While not easily quantified, these costs are real and seriously affect DON's ability to accomplish its mission.

c. We must ensure that all DON military and civilian personnel are treated fairly with dignity and mutual respect, and that sexual harassment does not adversely affect the DON's ability to accomplish its mission. While the EEOC regulations, reference (d), establish a standard for determining employer liability for sexual harassment under the Title VII of the Civil Rights Act, the DOD definition of sexual harassment, reference (e), establishes a standard that exceeds the EEOC definition. This more comprehensive standard expands on the definition to include identifying supervisors and those in command positions who use or condone implicit or explicit sexual behavior to affect another's career, pay, or job as engaging in sexual harassment.

7. Policy. The DON is committed to maintaining a work environment free from unlawful discriminatory practices and inappropriate behavior. Leadership is the key to eliminating all forms of unlawful discrimination. Sound leadership must be the cornerstone of the effort to eliminate sexual harassment. In support of this commitment, it is DON policy that:

a. Sexual harassment is prohibited. All DON personnel, military and civilian, will be provided a work environment free from sexual harassment.

b. All DON personnel, military and civilian, will be educated and trained, upon accession (within 90 days to the extent possible) and annually thereafter, in the areas of identification, prevention, resolution, and elimination of sexual harassment. Training programs will use a three-tiered behavioral zone approach to explain the spectrum of sexual harassment, as outlined in enclosure (3).

c. Individuals who believe they have been sexually harassed will be afforded multiple avenues to seek resolution and redress. Commanders and those in supervisory positions will ensure that notification of sexual harassment can be made in a command climate that does not tolerate acts of reprisal, intimidation, or further acts of harassment. All personnel will be made aware of the avenues of resolution and redress that are available.

d. All reported incidents of sexual harassment will be investigated and resolved at the lowest appropriate level. The nature of the investigation will depend upon the particular facts and circumstances and may consist of an informal inquiry where that action is sufficient to resolve factual issues. All incidents will be resolved promptly and with sensitivity. Confidentiality will be maintained to the extent possible. Feedback will be provided to all affected individuals consistent with the requirements of the Privacy Act and other pertinent laws, regulations, and negotiated agreements.

e. Counseling support or referral services will be made available for all involved in incidents of sexual harassment.

8. Accountability

a. Sexual harassment is prohibited.

b. No individual in the DON shall:

(1) Commit sexual harassment, as defined in enclosure (1);

(2) Take reprisal action against a person who provides information on an incident of alleged sexual harassment;

(3) Knowingly make a false accusation of sexual harassment; or

(4) While in a supervisory or command position, condone or ignore sexual harassment of which he or she has knowledge or has reason to have knowledge.

c. The rules in subparagraphs 8b are regulatory orders and apply to all DON personnel individually without further implementation. A violation of these provisions by military personnel is punishable in accordance with the UCMJ, and is the basis for disciplinary action with respect to civilian employees. The prohibitions in subparagraph 8b apply to all conduct which occurs in or impacts a DOD working environment as defined in enclosure (2). The reasonable person standard as defined in enclosure (2) shall be used to determine whether a violation of these provisions has occurred.

d. The appropriate action to resolve an incident of sexual harassment will depend on the circumstances surrounding that incident. Incidents of sexual harassment cover a wide range of behaviors, from verbal comments to rape. Likewise, the full range of administrative and disciplinary actions is available to address sexual harassment. In the case of military personnel, these include informal counseling, comments in fitness reports and evaluations, administrative separation, and punitive measures

under the UCMJ. In the case of civilians, options include informal counseling, comments in performance evaluations, and disciplinary action including removal from the Federal Service.

e. Administrative Separation. Military personnel of the Navy and Marine Corps shall be processed for administrative separation on the first substantiated incident of sexual harassment involving any of the following circumstances (for the purposes of this subparagraph, an incident is substantiated if there has been a court-martial conviction or if the commanding officer determines that sexual harassment has occurred):

(1) Action, threats, or attempts to influence another's career or job in exchange for sexual favors; or

(2) Physical contact of a sexual nature which, if charged as a violation of the UCMJ, could result in a punitive discharge.

f. Commanders are not precluded from initiating administrative separation proceedings for reasons set forth in the appropriate service regulations for individuals whose conduct warrants separation not covered in subparagraph 8e.

9. Responsibility

a. Commanders and supervisors are responsible for leading the men and women under their control. It is not the intent of this instruction to impair their ability to take appropriate actions to carry out leadership responsibilities. They must set the example in treating all people with mutual respect and dignity, fostering a climate free of all forms of discrimination and eliminating sexual harassment. Such a climate is essential to maintain high morale, discipline, and readiness. Commanders and supervisors are responsible for and must be committed to preventing sexual harassment in their commands and work environments. They must not ignore or condone sexual harassment in any form, and they must take whatever action is required to ensure that a recipient of sexual harassment is not subsequently also the victim of

reprisal or retaliation. These responsibilities regarding sexual harassment are part of the broader responsibility of commanders and supervisors to foster a positive climate and take appropriate corrective action when conduct is disruptive, provoking, discriminatory, or otherwise unprofessional.

b. Individuals who believe they have been sexually harassed are encouraged to address their concerns or objections regarding the incident directly with the person demonstrating the harassing behavior. Persons who are subjected to or observe objectionable behavior should promptly notify the chain of command if:

- (1) The objectionable behavior does not stop; or
- (2) The situation is not resolved; or
- (3) Addressing the objectionable behavior directly with the person concerned is not reasonable under the circumstances; or
- (4) The behavior is clearly criminal in nature.

If the person demonstrating the objectionable behavior is a direct superior in the chain of command or the chain of command condones the conduct or ignores a report, individuals who have been subjected to or who observe objectionable behavior are encouraged to promptly communicate the incident through other available means.

c. All personnel are responsible for treating others with mutual respect and dignity. This means fully and faithfully complying with this instruction. All DON personnel are accountable for their actions.

10. Action. The Chief of Naval Operations, the Commandant of the Marine Corps, the Chief of Naval Research, and the Administrative Assistant to the Under Secretary of the Navy shall take

action to enforce the provisions of this instruction. These actions shall ensure that:

- a. All DON personnel** under their cognizance comply with this instruction.
- b. Education and training programs** are in place at all levels within the DON. These programs will cover identification, prevention, resolution and elimination of sexual harassment and will be implemented from entry through executive levels.
- c. An effective system** is in place to resolve complaints of sexual harassment at the lowest possible level. The system will emphasize individual accountability of the recipient, accused, co-workers, and the chain of command; clarify the roles for co-workers and the chain of command; teach interpersonal communications skills; and incorporate the concepts of a reprisal free environment, timely resolution and appropriate feedback to all parties. Due to the volatile and potentially damaging nature of the allegations, confidentiality will be maintained to the extent possible without thwarting resolution.
- d. Systems** are in place to monitor the DON's progress in eliminating sexual harassment and to evaluate DON education and training programs including attendance at and effectiveness of those programs. These systems will include surveys, assessments, and an integrated database, featuring standardized information to track formal complaints of sexual harassment.
- e. A counseling support and referral network** exists and is advertised.
- f. Commanders and supervisors** investigate and, to the extent that authority to do so is vested in them by law or regulation, take such action as they consider appropriate on all alleged violations of this instruction.

SEAN O'KEEFE

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**DEPARTMENT OF THE NAVY
DEFINITION OF SEXUAL HARASSMENT**

Sexual harassment is a form of sex discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- a. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career, or
- b. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or
- c. Such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military member or civilian employee who makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

GLOSSARY OF TERMS

1. **Career or Employment Decisions.** The decision must concern some aspect of the employment, career, pay, duty assignment, benefits, or privileges of another.
2. **Condition.** To make some aspect of another's employment, career, pay, duty assignment, benefits, or privileges contingent upon fulfillment of some requirement the maker thereof has no right to impose.
3. **Discrimination.** For purposes of this instruction, discrimination means the illegal treatment of a person or group based on handicap, race, color, national origin, age, religion, or sex. Sex discrimination refers to the practice of wrongfully treating men and women differently in the workplace, solely because of their sex. The Supreme Court has held that sexual harassment of both men and women is a form of sex discrimination.
4. **Hostile Environment.** A type of sexual harassment that occurs when the unwelcome sexual behavior of one or more persons in a workplace produces a work atmosphere which is offensive, intimidating, or abusive to another person using the reasonable person standard.
5. **"Quid Pro Quo" or "This for That."** A type of sexual harassment that occurs when submitting to or rejecting such behavior is used as a basis for decisions affecting any person's employment, job, pay, or career. This could be a promise of employment, a promotion, a threat of or an actual demotion, a duty assignment, or a positive or negative performance evaluation.
6. **Reasonable Person Standard.** An objective test used to determine if behavior constitutes sexual harassment. This standard considers what a reasonable person's reaction would have been under similar circumstances and in a similar environment. The reasonable person standard considers the recipient's perspective and not stereotyped notions of acceptable behavior. For example, a work environment in which sexual slurs, the display of sexually suggestive calendars, or other offensive sexual behavior abound can constitute sexual harassment even if other people might deem it to be harmless or insignificant.
7. **Recipient.** Anyone subjected to sexual harassment as defined in this instruction.

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8. **Reprisal.** The wrongful threatening or taking of either unfavorable action against another or withholding favorable action from another solely in response to a report of sexual harassment or violations of this instruction.

9. **Severe or pervasive.** These terms derive their meaning in the context of the conduct engaged in and the surrounding facts and circumstances. Obvious examples of severe conduct include indecent assaults or offensive requests for sexual favors. Pervasive conduct is that which is repeated or widespread, or evidences a pattern.

10. **Sexual Favors.** Sexual privileges that are granted or conceded in the work environment.

11. **Sexual Nature.** Conduct that a reasonable person would find sexual in nature in light of the relevant facts and circumstances. Behavior does not need to be overtly sexual if it creates an offensive work environment. Examples include but are not limited to sexist remarks or slurs, sexual advances, displays of pornographic material, touching, language, gestures, mannerisms, and similar behavior.

12. **Unwelcome.** Conduct that is not solicited and which is considered objectionable by the person to whom it is directed and which is found to be undesirable or offensive using a reasonable person standard.

13. **Work Environment.** The workplace or any other place that is work-connected, as well as the conditions or atmosphere under which people are required to work. Examples of work environment include, but are not limited to, an office, an entire office building, a DOD base or installation, DOD ships, aircraft or vehicles, anywhere when engaged in official DON business, as well as command-sponsored social, recreational and sporting events, regardless of location.

RANGE OF BEHAVIORS WHICH CONSTITUTE SEXUAL HARASSMENT

1. Introduction. This enclosure explains and illustrates behaviors which may constitute sexual harassment by describing in layperson's terms what sexual harassment is and how it occurs in the work environment. This enclosure is intended to be used as a guide for developing training programs and to assist military members and civilian employees in distinguishing between acceptable and unacceptable behavior in the work environment. DON policy and prohibitions governing sexual harassment are contained in the basic instruction and enclosures (1) and (2).

2. Background

a. The world has changed dramatically in recent years, and America's national security policy has also changed. Reference (f) defines a vision for the Navy and Marine Corps to support that policy into the 21st Century. The new vision represents a fundamental shift away from open-ocean warfare on the sea toward joint operations from the sea, as part of the nation's "sea-air-land" team. The need to maximize efficiency and teamwork remains firm. The Navy-Marine Corps Team must be comprised of an optimally integrated group of men and women, who must be able to work together to get the job done. Each member of the team is entitled to be treated fairly, with dignity and respect, and must be allowed to work in an environment free of discrimination.

b. Sex discrimination in the workplace is not a new problem; however, prior to 1964 there were inadequate legal protection against it. In 1964, the U.S. Congress passed Title VII of the Civil Rights Act, which prohibits various forms of discrimination in employment. In 1972, the Civil Rights Act was made applicable to federal employees (reference (e)), but it was not until the late 1970's that sexual harassment began to be recognized as a form of sex discrimination. In 1980, the EEOC, established to enforce Title VII, issued the regulations in reference (d). These regulations include a definition of sexual harassment and conditions under which an employer may be held liable for its occurrence. They have been used as a basis for legal actions brought against employers for violating the Civil Rights Act. The EEOC definition of sexual harassment has been upheld by the Supreme Court and has also been used as a basis for DOD policies on sexual harassment (see references (a) through (c)).

c. In the 1990's sexual harassment is receiving increased attention. The costs to resolve incidents of sexual harassment are significant. Even more harmful and costly, however, are the negative effects sexual harassment has on productivity and readiness. These include costs associated with increased

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absenteeism, greater personnel turnover, lower morale, decreased effectiveness, and a loss of personal, organizational, and public trust. While not easily quantified, these costs are just as real and seriously affect the DON's ability to meet the needs of our Nation.

3. Sexual Harassment. Basically, sexual harassment means bothering someone in a sexual way. In the context of this instruction, it is behavior that is unwelcome, is sexual in nature, and is connected in some way with a person's job or work environment. A wide range of behaviors can meet these criteria, and therefore, constitute sexual harassment. Even with this rather simplistic way of explaining it, trying to determine exactly what kinds of behavior constitute sexual harassment often is not easy. The policy established by this instruction is not intended to prevent the types of behavior which are appropriate in normal work settings and which contribute to camaraderie.

4. Discussion. For a person's behavior to be considered sexual harassment, it must meet three criteria: it must be unwelcome, be sexual in nature, and occur in or impact on the work environment.

a. Unwelcome behavior is behavior that a person does not ask for and which that person considers undesirable or offensive. Not everyone has the same perception of "undesirable or offensive." What is acceptable for some people is not acceptable for others. So whose perception should be used? Since the person being subjected to the behavior--the recipient--is the one being affected, it is the recipient's perception that counts. As long as the recipient is a reasonable person and not overly sensitive, behavior which the recipient finds unwelcome should be stopped. Using this "reasonable person standard," from the perspective of the recipient, is really no more than using common sense.

b. Behavior which is sexual in nature is fairly easy to determine. Telling sexually explicit jokes, displaying sexually suggestive pictures, and talking about sex are obviously "sexual in nature." Some people would consider other behaviors, such as touching, to be sexual in some cases but not in others. Not all touching is sexual in nature, but if the touching is to certain parts of the body or is done suggestively, it definitely is. Again, using common sense will normally be enough to determine whether or not a certain behavior is sexual in nature.

c. For sexual harassment to occur, unwelcome sexual behavior must occur in or impact on the work environment:

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(1) When recipients are offered or denied something that is work-connected in return for submitting to or rejecting unwelcome sexual behavior, they have been subjected to a type of sexual harassment known as "quid pro quo" ("this for that"). Examples include: getting or losing a job, a promotion or demotion, a good or bad performance evaluation, etc. Basically, if any work-connected decisions are made based on the submission to or rejection of the unwelcome sexual behavior, sexual harassment has occurred. Normally, this is from a senior to a junior, because the senior person has something to offer.

• (2) When the unwelcome sexual behavior of one or more persons in a workplace interferes with another person's work performance, sexual harassment has occurred. If the behavior produces a work atmosphere which is offensive, intimidating, or abusive to another person, whether or not work performance is affected, a type of sexual harassment has occurred called "hostile environment." The following are a few examples of behavior that could create a hostile environment:

- (a) Using sexually explicit or sexually offensive language.
- (b) Displaying sexually-oriented posters or calendars of nude or partially-clad individuals.
- (c) Touching someone in a suggestive manner (e.g., intentionally brushing against them or pinching).
- (d) Giving someone unwelcome letters, cards, or gifts of a personal nature, when these items have sexual overtones.
- (e) Unwanted or uninvited pressure for dates.

(3) Certain types of unwelcome sexual behavior do not have to create a "hostile environment" to be considered sexual harassment. If the behavior occurs in the work environment and is unreasonable, such as fondling or groping, it would be considered sexual harassment, even if it were displayed only once. Other less obvious behaviors can become sexual harassment if they are repeated.

5. Range of Behaviors. There is a wide range of behaviors, from leering to rape, which can be unwelcome, sexual, and work-connected and can, therefore, constitute sexual harassment. Some behavior may be unwelcome and work-connected, but not sexual (for example, performance counseling). This behavior is not sexual harassment. To make it easier to understand, it is helpful to think of the entire range of possible behavior in terms of a

traffic light. The traffic light has three colors, and behavior may be divided into three zones. Green on the traffic light means "go"; behavior in the green zone means "it's acceptable." It is not sexual harassment. Red on the traffic light means "stop"; the red behavior zone means "don't do it." It is sexual harassment. The third color on the traffic light, yellow, means "use caution." The yellow behavior zone may be sexual harassment. Just as with a traffic light, if in the yellow zone long enough, the light will turn red. If yellow zone behavior is repeated enough, especially after having been told it is unwelcome, it becomes red zone behavior--sexual harassment. The following examples illustrate these three types of behavior, but they are certainly not all-inclusive:

a. **Green zone.** These behaviors are not sexual harassment: performance counseling, touching which could not reasonably be perceived in a sexual way (such as touching someone on the elbow), counseling on military appearance, social interaction, showing concern, encouragement, a polite compliment, or friendly conversation.

b. **Yellow zone.** Many people would find these behaviors unacceptable, and they could be sexual harassment: violating personal "space", whistling, questions about personal life, lewd or sexually suggestive comments, suggestive posters or calendars, off-color jokes, leering, staring, repeated requests for dates, foul language, unwanted letters or poems, sexually suggestive touching, or sitting or gesturing sexually.

c. **Red zone.** These behaviors are always considered sexual harassment: sexual favors in return for employment rewards, threats if sexual favors are not provided, sexually explicit pictures (including calendars or posters) or remarks, using status to request dates, or obscene letters or comments. The most severe forms of sexual harassment constitute criminal conduct, e.g. sexual assault (ranging from forcefully grabbing to fondling, forced kissing, or rape).

Note: Keep in mind that the above examples are used as guidance only, that individuals believe they are being sexually harassed based on their perceptions, that each incident is judged on the totality of facts in that particular case, and that individuals' judgment may vary on the same facts. Therefore, caution in this area is advised. Any time sexual behavior is introduced into the work environment or among co-workers, the individuals involved are on notice that the behavior may constitute sexual harassment.

A BILL

To amend chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), to improve the quality and efficiency of the military justice system.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. SEXUAL HARASSMENT

(a) IN GENERAL. Section 893a of title 10, United States Code (article 93a of the Uniform Code of Military Justice) is new and added to read as follows:

"§ 893a. Art. 93a. Sexual harassment

(a) Any person subject to this chapter who-

(1) wrongfully communicates a threat or an offer to another to influence some aspect of the career, pay, job, duty assignment, benefits, or privileges of another with the intent to obtain sexual favors; or

(2) engages in conduct which by its sexual nature wrongfully interferes with another's professional performance or wrongfully creates an intimidating, hostile, or offensive environment; or

(3) while in a command or supervisory position, knows or has reason to know that an intimidating, hostile, or offensive environment exists due to wrongful conduct of a sexual nature or that another is threatening or offering to influence some aspect of the career, pay, job, duty assignment, benefits, or privileges of another in exchange for sexual favors, and fails to take appropriate action;

is engaging in sexual harassment and shall be punished as a court-martial may direct.

(b) In reference to subsection (a)(2), whether conduct of a sexual nature wrongfully interferes with another's performance or wrongfully creates an intimidating, hostile, or offensive environment is determined by all the known facts and circumstances surrounding that conduct based on an objective, reasonable standard. If a person is properly notified that his or her conduct wrongfully interferes with another's performance or wrongfully creates an intimidating, hostile or offensive environment, and he or she continues the complained of conduct or substantially similar conduct, this constitutes *prima facie* evidence that an intimidating, hostile, or offensive environment exists or that the accused's conduct wrongfully interferes with

another's professional performance for the purpose of subsection (a)(2). This presumption is permissive and may be rebutted.

(c) Conduct which may be charged and proved under this article may not be the basis for a conviction under any other article except sections 920 (article 120), 925 (article 125), 928(b) (article 128(b)), and 933 (article 133). Conduct which does not violate this article may be the basis for a conviction under other applicable articles."

Sec. 2. EFFECTIVE DATE. The amendment made by subsection (a) shall apply only to offenses committed on or after the effective date of this Act.

18. Article 93a - Sexual harassment

a. Text.

"(a) Any person subject to this chapter who-

(1) wrongfully communicates a threat or an offer to another to influence some aspect of the career, pay, job, duty assignment, benefits, or privileges of another with the intent to obtain sexual favors; or

(2) engages in conduct which by its sexual nature wrongfully interferes with another's professional performance or wrongfully creates an intimidating, hostile, or offensive environment; or

(3) while in a command or supervisory position, knows or has reason to know that an intimidating, hostile, or offensive environment exists due to wrongful conduct of a sexual nature or that another is threatening or offering to influence some aspect of the career, pay, job, duty assignment, benefits, or privileges of another in exchange for sexual favors, and fails to take appropriate action;

is engaging in sexual harassment and shall be punished as a court-martial may direct.

(b) In reference to subsection (a)(2), whether conduct of a sexual nature wrongfully interferes with another's performance or wrongfully creates an intimidating, hostile, or offensive environment is determined by all the known facts and circumstances surrounding that conduct based on an objective, reasonable standard. If a person is properly notified that his or her conduct wrongfully interferes with another's performance or wrongfully creates an intimidating, hostile or offensive environment, and he or she continues the complained of conduct or substantially similar conduct, this constitutes *prima facie* evidence that an intimidating, hostile, or offensive environment exists or that the accused's conduct wrongfully interferes with another's professional performance for the purpose of subsection (a)(2). This presumption is permissive and may be rebutted.

(c) Conduct which may be charged and proved under this article may not be the basis for a conviction under any other article except sections 920 (article 120), 925 (article 125), 928(b) (article 128(b)), and 933 (article 133). Conduct which does not violate this article may be the basis for a conviction under other applicable articles.

b. Elements.

(1) *Communication of a threat or an offer to another with the intent to obtain sexual favors.*

(a) That the accused wrongfully communicated a threat or an offer to another to influence some aspect of the career, pay, job, duty assignment, benefits, or privileges of another; and

(b) That the accused wrongfully intended to obtain sexual favors.

(2) *Wrongful interference with another's professional performance or creation of an intimidating, hostile, or offensive environment.*

(a) That the accused did certain acts or communicated certain language;

(b) That the acts were of a sexual nature; and

(c) That the acts either reasonably tended to interfere with another's professional performance or the acts reasonably tended to create an intimidating, hostile, or offensive environment.

(3) *Failure of a commander or supervisor to take appropriate action.*

(a) That the accused was in a command or supervisory position;

(b) That the accused knew or had reason to know that an intimidating, hostile, or offensive environment existed in his or her command or area of supervisory responsibility or knew or had reason to know that another communicated a threat or an offer to another to influence some aspect of the career, pay, job, duty assignment, benefits, or privileges of another with the intent to obtain sexual favors; and

(c) That the accused (willfully) (through culpable negligence) failed to take appropriate action.

c. Explanation.

(1) *Communication of a threat or an offer.*

(a) *In general.* Sexual harassment is complete upon communication of the threat or offer with the requisite intent. Neither the ability of the accused to carry out the threat or offer nor the actual or probable success of the threat or offer

need be proved. The threat or offer does not have to be directed at the person from whom the accused is attempting to obtain sexual favors. The threat or the offer for sexual favors need not be for the benefit of the accused but may be for the benefit of any third party.

(b) *Communication*. The communication may take any form by which the accused is able to express his or her intent to threaten or offer to influence some aspect of the career, pay, job, duty assignment, benefits, or privileges of another to obtain sexual favors.

(c) *Threat or offer*. The threat or offer must concern some aspect of the career, job, pay, duty assignment, benefits, or privileges of another. A threat or offer to influence something reasonably unrelated to the above is not covered by this offense.

(d) *Subordinate may commit this offense*. This offense does not require that the accused be senior to the victim. The accused may commit this offense by communicating a threat or offer with the intent to obtain sexual favors from a senior or a person of equal authority.

(e) *Sexual favors*. "Sexual favors" is intended to include any conduct which is of a sexual nature. The conduct can be either explicitly or implicitly sexual. Examples of explicit sexual favors include, but are not limited to, sexual intercourse and sexual touching. Examples of implicit sexual favors may include, but are not limited to, requests for dates or requests that another dress in a particular fashion.

(2) *Wrongful interference with another's professional performance or creation of an intimidating, hostile, or offensive environment*.

(a) *Nature of the offense*.

(i) Conduct violative of Article 93a(a)(2) is action or behavior which either tends to interfere with the professional performance of another or tends to create an intimidating, hostile, or offensive environment. The prohibited conduct must be of a sexual nature. Whether or not conduct is of a sexual nature is to be determined in light of all the facts and surrounding circumstances. The conduct must also reasonably tend to interfere with another's professional performance, or must reasonably tend to offend another, or prejudice the good order and discipline in the armed forces or bring discredit upon the armed forces. The prohibited conduct includes, but is not limited to, displays of material, touching, language, gestures, and mannerisms. See paragraph 60c(2) and (3) for a discussion of conduct prejudicial to good order and discipline in the armed

forces and conduct of a nature to bring discredit upon the armed forces.

(ii) "Interference with another's professional performance" is limited to those persons who have professional contact with the accused regarding his or her duties including, but not limited to, other servicemembers, Department of Defense employees, and Department of Defense contract personnel.

(b) *Intimidating, hostile, or offensive environment.*

(i) An "intimidating, hostile, or offensive environment" exists when, in light of all the facts and circumstances, a reasonable person would view the accused's conduct as sufficiently severe or pervasive as to prejudice the good order and discipline in the armed forces or to bring discredit upon the armed forces. The intimidating, hostile, or offensive environment is not physically limited to the duty workplace, military or civilian, and can potentially exist in any place, at any time. The harm sought to be prevented by Article 93a(a)(2) is the infringement of individual rights, as well as the detriment to mission accomplishment, morale, and good order and discipline that results from sexual harassment.

(ii) Whether anyone consents to, welcomes, or is ambivalent towards the conduct is not necessarily controlling as to whether or not the offense has been committed. However, the subjective perceptions of others will normally be relevant to the determination of whether the accused's conduct was wrongful. See subparagraph c(2)(c).

(iii) This offense is not intended to apply to instances where there is a reasonable expectation of privacy unless conduct in those instances adversely affects good order and discipline in the armed forces or brings discredit upon the armed forces.

(c) *Objective standard.*

(i) To be guilty of the offense under Article 93a(a)(2), the conduct must reasonably interfere with another's professional performance or reasonably tend to create an intimidating, hostile, or offensive environment. This is an objective test which requires an examination of all the facts and circumstances surrounding the conduct. The trier of fact must determine whether a reasonable person under similar or like circumstances would consider the conduct of the accused to interfere with another's professional performance or create an intimidating, hostile, or offensive environment.

(ii) Because Article 93a(a)(2) is a general intent crime, the accused need not have specifically intended either to interfere with another's professional performance or create an intimidating, hostile or offensive environment. However, evidence, if any, of the accused's state of mind will normally be relevant.

(d) *Subordinate may commit this offense.* Relative rank or grade is not an element of this offense. It can be committed by anyone regardless of relative rank or grade.

(e) *Statutory rule of evidence.* With respect to Article 93a(b), establishing *prima facie* evidence of conduct which wrongfully interferes with another's professional performance or wrongfully creates an intimidating, hostile, or offensive environment, is a statutory rule of evidence. If, after an accused is informed that his or her conduct constitutes sexual harassment as defined in Article 93a(a)(2), and he or she continues the same or substantially similar conduct, evidence presented at trial of the conduct and the notice is adequate to establish the sufficiency of the evidence for existence of an intimidating, hostile, or offensive environment or that the accused's conduct wrongfully interferes with another's professional performance. This statutory rule of evidence is only applicable, however, for an Article 93a(a)(2) offense. The trier of fact has the ultimate responsibility to determine the factual sufficiency of the evidence which must be judged on the reasonableness standard described in subparagraph c(2)(c).

The notice to the accused must be given either by a military superior or civilian supervisor or an individual to whom or about whom the conduct is specifically directed. The notice to the accused must be given with a reasonable degree of specificity as to the nature of the accused's conduct and the identity of the victim(s), if any. If the allegedly offensive conduct is not directed specifically at another, the statutory notice can only be invoked by notice from a military superior or civilian supervisor.

The statutory rule of evidence does not preclude a finding of a violation of this article even when the accused was not on notice. The absence of complaint by an individual against whom conduct is allegedly directed or by an individual who finds it offensive is a fact that may be considered under the totality of the circumstances test.

(3) *Failure of a commander or supervisor to take appropriate action.*

(a) *Knowledge.* "Knows" as used in this section means that the accused has actual knowledge of a violation of Article 93a(a)(1) or (2). "Reason to know" as used in this

section means, based on all the facts and circumstances, that the accused has some evidence that there exists a violation of Article 93a(a)(1) or (2). Knowledge may be proved by direct or circumstantial evidence.

(b) Under Article 93a(a)(3), the accused can be convicted for failure to take appropriate action only if there has been a violation of Article 93a(a)(1) or (2). A judicial or administrative determination of another's responsibility or accountability for sexual harassment is irrelevant to the accused's guilt under Article 93a(a)(3). The accused can violate his or her duty either willfully or through culpable negligence. "Willfully" means intentionally. It refers to acting or failing to act knowingly and purposely, thereby specifically intending the natural and probable consequences of the act or omission. "Culpable negligence" is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a disregard for the foreseeable consequences of that act or omission. To be culpably negligent, some degree of knowledge is required. For example, an accused who has actual knowledge of a violation of this article, and through inattention, neglect, delay, or dereliction, fails to act, may be culpably negligent. An accused who has circumstantial evidence of a violation of this article and, through inattention, neglect, delay or dereliction, fails to act, may also be culpably negligent.

(4) *Preemption*. Article 93a(c) is a limited preemption doctrine. Conduct which amounts to sexual harassment as defined by the article shall be charged and proved under this article alone except for those sections specified in Article 93a(c). Conduct which can be a basis for a conviction for both this article and the sections specified in Article 93a(c) can be separately charged and proved. Conduct which does not amount to sexual harassment as defined by this article may be charged and proved under other applicable articles. Alternative pleading and lesser included offenses are not affected by this limited preemption doctrine.

(5) *Defenses*. The fact that the accused's conduct is directed at his or her spouse is not a *per se* defense. See R.C.M. 916.

d. *Lesser included offenses*.

(1) Communication of a threat or an offer.

(a) Article 134 - solicitation of a crime

(b) Article 134 - communicating a threat

(c) Article 93 - cruelty and maltreatment

(d) Article 117 - provoking speech or gestures

(e) Article 93a(2) - wrongful interference with another's professional performance or creation of an intimidating, hostile, or offensive environment

(f) Article 80 - attempts

(2) Interference with professional performance or creation of an intimidating, hostile, or offensive environment.

(a) Article 93 - cruelty and maltreatment

(b) Article 134 - indecent assault

(c) Article 134 - indecent acts with another

(d) Article 134 - indecent language

(e) Article 134 - indecent exposure

(f) Article 128 - assault; assault consummated by a battery

(g) Article 117 - provoking speech or gestures

(h) Article 134 - disorderly conduct

(i) Article 80 - attempts

(3) Failure of a commander or supervisor to take appropriate action.

(a) Article 92 - dereliction in the performance of duty

e. Maximum punishment.

(1) Article 93a(a)(1) offenses.

(a) Sexual harassment by offer to influence.

Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(b) Sexual harassment by threat to influence.

Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(2) Article 93a(a)(2) offenses.

(a) Sexual harassment by interference with professional performance or creation of an intimidating, hostile,

or offensive environment through words, gestures, mannerisms and displays of material. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(b) Sexual harassment by interference with professional performance or creation of an intimidating, hostile, or offensive environment through touching. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(3) Article 93a(a)(3) offenses.

(a) Sexual harassment by failing to take appropriate action with reason to know through culpable negligence. Forfeiture of all pay and allowances, and confinement for 6 months.

(b) Sexual harassment by failing to take appropriate action with actual knowledge through culpable negligence. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(c) Sexual harassment by willfully failing to take appropriate action with reason to know. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(d) Sexual harassment by willfully failing to take appropriate action with actual knowledge. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Communication of a threat or an offer.

In that _____ (personal jurisdiction data), did, (at/on board--location), on or about _____ 19_____, with wrongful intent to obtain sexual favors, to wit: (herein describe the sexual favor(s)) wrongfully communicate to _____ (a threat) and/or (an offer) to influence (herein describe the threat or offer to influence some aspect of the career, pay, job, duty assignment, benefits, or privileges of another).

(2) Wrongful interference with another's professional performance or creation of an intimidating, hostile, or offensive environment.

In that _____ (personal jurisdiction data), did, (at/on board--location), on or about _____ 19_____, (sexually harass _____ by committing) (commit) certain acts of a sexual nature, to wit: (herein describe the acts of a sexual

nature) and the acts wrongfully (interfered with another's professional performance) (created an intimidating, hostile, or offensive environment).

(3) Failure of a commander or supervisor to take appropriate action.

In that _____ (personal jurisdiction data), did, while in a (command) (supervisory) position, to wit: _____, (at/on board--location), on or about _____ 19_____, [(know) (have reason to know)] [(that an intimidating, hostile, or offensive military environment existed) (that another communicated a threat or an offer to influence some aspect of the career, pay, job, duty assignment, benefits, or privileges of another, with intent to obtain sexual favors)] and that _____ (willfully) (through culpable negligence) failed to take appropriate action.